IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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## No. 77-1075

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AMERICAN SOCIETY OF TRAVEL AGENTS, INC., *et al.*,
*Petitioners,*

v.

MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, *et al.*,
*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Petitioners, the American Society of Travel Agents, Inc. and twelve of its individual travel agency members, pray that a writ of certiorari issue to review the judgment rendered in this case by the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

On May 23, 1975, the United States District Court for the District of Columbia dismissed petitioners' complaint [1] for failure to state a claim upon which relief can be

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[1] Petitioners' complaint appears as Appendix A hereto.

granted. The district court's memorandum opinion, not officially reported, is unofficially reported at 36 A.F.T.R.2d 75-5142 (D.D.C. May 23, 1975), and appears as Appendix B to this petition.

On September 15, 1977, the United States Court of Appeals for the District of Columbia Circuit affirmed that decision on the ground that petitioners lacked standing to maintain this action. The opinion of the court of appeals, not yet reported, appears as Appendix C hereto.[2] The judgment of the court of appeals, entered on September 15, 1977, appears as Appendix D.

Petitioners' timely petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals on November 1, 1977. The court's order denying the petition for rehearing appears as Appendix E hereto, and its denial of petitioners' suggestion for rehearing *en banc* appears as Appendix F.

## JURISDICTION

As indicated, petitioners' timely petition for rehearing and suggestion for rehearing *en banc* were denied by the court of appeals on November 1, 1977.[3]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

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[2] Appendix C also includes the dissenting opinion of Chief Judge Bazelon, which was filed as a common dissent in the instant case and in *Tax Analysts and Advocates v. Blumenthal*, No. 75-1304 (D.C. Cir. June 15, 1977), *petition for cert. filed*, 46 U.S.L.W. 3338 (U.S. Nov. 14, 1977) (No. 77-681). *See* Appendix C, at 30a. The majority opinion in the *Tax Analysts* case appears as Appendix G to this petition.

[3] *See* Appendices E, F.



## QUESTIONS PRESENTED

1. Whether the refusal of federal tax authorities to enforce Sections 501(c)(3) and 511(a)(1) of the Internal Revenue Code against tax-exempt organizations which operate business enterprises unrelated to their tax-exempt purposes may ever be challenged by adversely affected tax-paying competitors of such enterprises.

2. Whether tax-paying business entities adversely affected by unfair and unlawful competition arising out of the refusal of federal tax authorities to enforce Sections 501(c)(3) and 511(a)(1) of the Internal Revenue Code must, *in their complaint*, identify specific lost customers in order to establish "injury in fact" for standing purposes.

## STATUTES INVOLVED

The statutory provisions involved in this proceeding are Section 501(c)(3) of the Internal Revenue Code of 1954, *as amended by* Pub. L. No. 94-455, §§ 1307(d)(1)(A), 1313(a), 90 Stat. 1727, 1730 (Oct. 4, 1976), and Sections 511(a)(1), 512(a)(1) and 513(a) of the Internal Revenue Code of 1954, *as amended*, 26 U.S.C. §§ 511(a)(1), 512(a)(1), 513(a) (1970). Those sections of the Internal Revenue Code appear as Appendix H to this petition.

## STATEMENT OF THE CASE

Petitioner American Society of Travel Agents, Inc. ("ASTA") is a not-for-profit trade association which represents more than 8,000 travel agents located throughout the United States.[4] The other petitioners herein are twelve individual travel agency members of ASTA which,

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[4] ASTA's membership has increased dramatically in recent years from the "more than 4,000" members indicated in the complaint herein. *See* Appendix A, ¶ 1, at 3a.

typical of the industry, are small independent businesses operating in local communities.[5]

On July 19, 1974, petitioners instituted this action for injunctive and declaratory relief in the United States District Court for the District of Columbia, against the Secretary of the Treasury and the Commissioner of Internal Revenue ("respondents"). In a two-count complaint, petitioners sought to eliminate the unfair competition of certain tax-exempt organizations which, with the specific approval of respondents, were taking unlawful advantage of their special tax-exempt status by engaging in extensive commercial travel programs—unrelated to their tax-exempt purposes—in direct competition with petitioners and other tax-paying travel agents.

Petitioners' first count alleged that the American Jewish Congress ("AJC") and certain other organizations deemed by respondents to be tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, *as amended*, 26 U.S.C. § 501(c)(3) (1970),[6] were operating extensive commercial travel programs, in contravention of Section 501(c)(3) which limits such organizations exclusively to educational, literary, religious, charitable,

[5] The travel agency petitioners in this action are: Vega International Travel Service (Chicago, Illinois), Garber Travel (Brookline, Massachusetts), George Kronengold Travel Service (Miami, Florida), Trade Wind Tours of Hawaii (San Francisco, California), Arnold Tours, Inc. (Boston, Massachusetts), Columbus Travel Service (Dorchester, Massachusetts), Fort Collins Travel Agency, Inc. (Fort Collins, Colorado), Platt World Travel Service (Lisle, Illinois), Rex Travel Organization, Inc. (Chicago, Illinois), Beverly Hills Travel Bureau, Inc. (Beverly Hills, California), George Kronengold Travel Service, Inc. (New York, New York) and Farr Tours (Miami Beach, Florida). Appendix A, ¶¶ 2-13, at 3a-4a.

[6] Section 501(c)(3) was further amended in 1976, as reflected in Appendix H hereto. The 1976 amendments, however, are not germane to this action. *See* Pub. L. No. 94-455, §§ 1307(d)(1)(A), 1313(a), 90 Stat. 1727, 1730 (Oct. 4, 1976).



scientific or other specifically enumerated purposes.[7] Petitioners further alleged that respondents had unlawfully permitted the AJC and other such organizations to maintain their tax-exempt status despite the large amounts of unrelated travel business income which they receive each year.[8] The complaint further alleged that, because of their tax-exempt status and other privileges flowing from such exempt status, the AJC and other similar organizations were able to and did in fact compete unfairly with the petitioners and other tax-paying travel agents by offering lower-cost travel programs than they otherwise would have been able to offer.[9] The complaint alleged that the petitioner travel agents and other tax-paying travel agents were losing revenue as a result of respondents' failure to revoke the exempt status of the AJC and other similarly situated tax-exempt organizations.[10]

The second count of petitioners' complaint alleged that respondents had refused to enforce, assess, and levy the unrelated business income tax imposed by Section 511(a)(1) of the Internal Revenue Code of 1954, *as amended*, 26 U.S.C. § 511(a)(1) (1970), on the AJC and other tax-exempt organizations which engage in commercial travel programs unrelated to their exempt purposes.[11] The second count specifically alleged that the predecessors in office of the respondent Commissioner of Internal Revenue had issued a Technical Advice Memorandum on May 15, 1970, advising that the AJC was not liable for the unrelated business income tax on its substantial travel income.[12] The second count further alleged that, as a

[7] Appendix A, ¶¶ 20-21, 23, at 5a-6a.

[8] Appendix A, ¶¶ 22-23, at 6a.

[9] Appendix A, ¶ 24, at 7a.

[10] Appendix A, ¶¶ 24-26, at 7a.

[11] Appendix A, ¶ 28, at 7a.

[12] Appendix A, ¶ 29, at 7a-8a.

result of this specific determination and others similar to it, the AJC and other tax-exempt organizations have escaped the payment of taxes, required by law to be imposed on the unrelated business income of tax-exempt organizations, thereby subjecting tax-paying competitors to unlawful and unfair competition.[13]

Petitioners' complaint prayed that the district court issue an order (i) requiring respondents to withdraw rulings granting tax-exempt status to the AJC and other organizations substantially involved in unrelated travel programs and permanently enjoining respondents from granting tax-exempt status to such organizations in the future; (ii) requiring respondents to undertake an appropriate investigation into the activities of the AJC and to take such action as necessary to comply with the law; (iii) requiring the respondent Commissioner of Internal Revenue to withdraw the Technical Advice Memorandum of May 15, 1970, which declared that the AJC was not liable for the payment of the unrelated business income tax on its income from travel operations, and to withdraw other like rulings; and (iv) granting declaratory relief.[14]

In a memorandum decision issued on May 23, 1975, the district court dismissed petitioners' complaint for failure to state a claim upon which relief can be granted.[15]

Petitioners appealed from that order to the United States Court of Appeals for the District of Columbia Circuit. On June 15, 1976, the court of appeals, *sua sponte*, ordered the parties to submit supplemental memoranda addressing the question of whether petitioners have standing to maintain this action in light of this Court's decision

[13] Appendix A, ¶¶ 30-32, at 8a.

[14] Appendix A, at 8a-9a.

[15] Appendix B.



in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Such memoranda were submitted on or about July 15, 1976.

On September 15, 1977, the court of appeals affirmed the dismissal of this case on the ground that petitioners lacked standing to maintain the action.[16] Petitioners' timely petition for rehearing and suggestion for rehearing *en banc* were denied on November 1, 1977.[17]

## REASONS FOR GRANTING THE WRIT

### I. The Court of Appeals Has Effectively Foreclosed the Only Legal Forum Available to Tax-Paying Business Entities Adversely Affected by Unfair Competition Arising Out of the Unlawful Refusal of Federal Tax Authorities to Enforce Sections 501(c)(3) and 511(a)(1) of the Internal Revenue Code. In So Doing, the Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

Dissenting from the court's ruling below "that a taxpayer suffering competitive injury lacks standing to challenge tax rulings applicable to a third party," [18] Chief Judge Bazelon observed:

> The majority . . . states with admirable candor that the case "presents a threshold issue of standing to sue reminiscent of Justice Stewart's observation, concurring in *Simon* v. *Eastern Kentucky Welfare Rights Organization, et al.*, 426 U.S. 26, 46 (1975), that he could not 'imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone

[16] Appendix C, at 18a, 22a, 27a-28a.

[17] Appendices E, F.

[18] Appendix C, at 30a (Bazelon, C.J., dissenting).

else.'" [Appendix C, at 18a.] Although the opinion does not directly address this question, it constructs a constitutional standard of injury in fact that would effectively preclude taxpayer suits claiming competitive injury.[19]

In ruling as it did, the majority indicated that it felt constrained by this Court's ruling in *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* to dismiss petitioners' complaint.[20] The majority reasoned:

> . . . [T]he lower cost of the tour packages offered by the AJC and other tax-exempt organizations may well be attributable at least in significant part to the use of volunteer labor or the willingness to accept lower profits than would commercial travel agents. Moreover, even if appellants were to prevail in this suit, members of § 501(c)(3) organizations might for a variety of reasons continue to prefer the travel programs operated by their own organizations. Alternately, such organizations might shift to tour packages whose religious or educational orientation would be more readily apparent. A third possibility is that travel by members of § 501(c)(3) organizations would simply decline.
>
> If any of these consequences, or some combination of them, ensued from a decision favorable to appellants, private travel agents would enjoy no gain whatever from their successful litigation. This is precisely the sort of situation in which the Supreme Court failed to find standing in *Eastern Kentucky.*[21]

If the ruling of the majority below is permitted to stand, then *any complaint* filed by *any plaintiff* suing as an adversely affected competitor which alleges that favorable and unlawful tax treatment of a third party has caused

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[19] *Id.* n.1.

[20] *See* Appendix C, at 18a, 22a, 27a-28a.

[21] Appendix C, at 25a.



him to lose customers will be vulnerable to summary dismissal.

In *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973), and again in *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* this Court has held that "federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." 426 U.S. at 41. Petitioners in the instant case have alleged that *they have suffered competitive injury, including loss of customers, as a result of the unlawful refusal of respondents* to enforce Sections 501(c)(3) and 511(a)(1) against the AJC and other similar organizations. They are prepared to prove that allegation. The court of appeals, however, has ruled that, because it can *conceive* of factors—other than favorable tax treatment—which *might* bestow *some* competitive advantage upon such organizations, petitioners' complaint should be dismissed. *Any competitor's complaint,* if subjected to such wholesale judicial speculation, would fall at the hands of an imaginative court.

The ruling of the court of appeals is not a fair application of the "causality" element of the "injury in fact" test for purposes of legal standing.[22] It is, rather, an absolute foreclosure of the only legal forum available to tax-paying business entities adversely affected by the failure of federal tax authorities to enforce Sections 501(c)(3) and 511(a)(1) of the Internal Revenue Code against tax-exempt organizations which engage in extensive business enterprises unrelated to their tax-exempt purposes.

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[22] Engaging in similarly unfounded speculation as to what might transpire in the event petitioners were to prevail herein, the court of appeals also misconstrued and misapplied the "redressability" element of the "injury in fact" test. *See* note 21 *supra* and accompanying text; notes 36-37, 39 *infra* and accompanying text.

In *Eastern Kentucky*, this Court specifically stated: "We do not reach . . . the question of whether a third party ever may challenge IRS treatment of another . . . ." 426 U.S. at 37. The court of appeals below has reached and decided that question, at least with respect to adversely affected competitors. The ramifications of that decision are ominous indeed,[23] and should not be permitted to obtain in the absence of specific consideration by this Court.

### II. The Decision of the Court of Appeals Is in Conflict With a Decision of the United States Court of Appeals for the First Circuit on the Issue of Standing.

In *Rental Housing Ass'n v. Hills*, 548 F.2d 388 (1st Cir. 1977), the United States Court of Appeals for the First Circuit was called upon to determine the standing *vel non* of a trade association of landlords which sought to challenge prospectively an award by the Department of Housing and Urban Development of financial assistance to a project for the conversion of a factory into low-income housing for the elderly. In its complaint, the plaintiff trade association alleged (i) that the proposed award of funding would reduce the amount of funds available for existing-housing subsidies in the future and (ii) that its members would "lose tenants to the new

[23] For example, if permitted to stand, the decision below will render a wide range of revenue-losing IRS determinations—otherwise properly reviewable—beyond the reach of judicial scrutiny. Where, such as here, the only persons (other than taxpayers generally) adversely affected by such rulings are competitors of an improperly favored person or organization, the courts will be helpless to remedy such administrative wrongs.

Moreover, the ruling below blatantly thwarts the express congressional purpose of protecting competitors such as the petitioners herein from unfair competition at the hands of tax-exempt organizations. *See* H.R. Rep. No. 2319, 81st Cong., 2d Sess. 36 (1950); S. Rep. No. 2375, 81st Cong., 2d Sess. 21-31 (1950). *See also* 26 C.F.R. § 1.513-1(b) (1977).



project and thereby suffer competitive harm." *Id.* at 389. The plaintiff association's standing was upheld specifically on the basis of the allegation of *prospective competitive injury*. The court held:

> . . . [W]e think the allegation of competitive injury sufficient [to satisfy the "injury in fact" test]. While the . . . project is not yet completed, and hence specific proof of competitive injury is not possible, it could hardly be thought that administrative action *likely to cause harm* cannot be challenged until it is too late. . . . *We see no insurmountable obstacles to proof of the likelihood that Rental Housing Association's members will lose tenants to the . . . project.*
>
> Defendants have cited, and we have found, no authority for the proposition that competitive harm is an insufficient allegation of injury in fact. Quite the contrary, the cases finding allegations of competitive injury sufficient are legion . . . .[24]

In the instant case, petitioners alleged not only that they would in the future suffer competitive injury as a result of respondents' actions, but indeed that they had suffered and were then suffering such injury, including loss of customers.[25] Notwithstanding those allegations, the majority below held:

> . . . [A]ppellants [petitioners herein] have not indicated with sufficient specificity either the manner in which their alleged injury occurred or the nature of that injury. Appellants point to no prospective customers who spurned the services of ASTA members because of appellees' [respondents'] allegedly inequitable tax treatment of § 501(c)(3) organizations. Nor do appellants identify tour package purchasers who in fact patronized the AJC or some other tax-exempt organization, but who might legitimately

[24] 548 F.2d at 389-90 (emphasis added).

[25] Appendix A, ¶¶ 24, 26, 27, 30, 32, at 7a-8a.

> be expected to do business with a private travel agent in the event appellees enforced the relevant tax code provisions according to appellants' recommendations. . . .[26]

Characterizing petitioners' allegations of competitive injury as "too speculative to support standing," [27] the court of appeals dismissed their complaint.[28]

The ruling of the court of appeals in this proceeding stands in direct conflict with the decision of the Court of Appeals for the First Circuit in the *Rental Housing* case. That conflict—which has arisen in the face of this Court's rulings in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), and *Simon v. Eastern Kentucky Welfare Rights Organization*, *supra*—should be resolved by this Court.[29]

### III. The Decision of the Court of Appeals Conflicts With Applicable Decisions of This Court on the Issue of Standing.

In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), this Court upheld the legal standing of certain vendors of data

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[26] Appendix C, at 22a.

[27] *Id.*

[28] Referring to the majority's several hypotheses as to possible reasons for the low cost of travel packages sold by tax-exempt organizations and as to what might happen if petitioners prevailed herein, Chief Judge Bazelon expressed the opinion that

> . . . it is the majority, not the appellants [petitioners], who is engaging in speculation. The economic basis of appellants' injury is straightforward . . . [and] compelling . . . .

Appendix C, at 39a (Bazelon, C.J., dissenting).

[29] The ruling below is also in direct conflict with at least two decisions rendered by other panels of the Court of Appeals for the District of Columbia Circuit since this Court's decision in the *Eastern Kentucky* case. *See Tax Analysts and Advocates v. Blumenthal*, *supra*, Appendix G, at 77a-78a; *National Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321 (D.C. Cir. 1976).



processing services to challenge an interpretive ruling of the Comptroller of the Currency which suggested that national banks may, consistent with the National Bank Act, offer data processing services to banks and bank customers.[30] Likewise, in *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), the Court upheld the standing of travel agents to challenge a similar ruling by the Comptroller relating to travel services. And, as Chief Judge Bazelon pointed out in his dissent below, this Court in *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971), upheld the standing of several investment companies in a similar action on the basis of allegations of competitive injury which "were no more specific tha[n] those of the [petitioners] in this case." [31]

*Data Processing* and its progeny stand firmly for the proposition that competitive injury, suffered as a result of unlawful third-party competition authorized by an administrative ruling, constitutes "injury in fact" sufficient to invest the adversely affected competitor with standing to challenge that ruling.[32] *See also Simon v.*

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[30] The Court reaffirmed the principle that the constitutional dimension of the standing issue

> ". . . is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

397 U.S. at 151-52, *quoting Flast v. Cohen*, 392 U.S. 83, 101 (1968). It expressly characterized *Data Processing* as "a *competitor's* suit," and specifically held that the petitioners had satisfied the "injury in fact" test. 397 U.S. at 152 (emphasis in original).

[31] Appendix C, at 41a (Bazelon, C.J., dissenting).

[32] Similarly, as the Court of Appeals for the First Circuit noted in *Rental Housing Ass'n v. Hills*, *supra*:

> Injury in fact has [also] been found where governmental agencies . . . engaged in activities which compete with the plaintiff's business, *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 88 S.Ct. 651, 19 L.Ed.2d 787 (1968); *P.A.M. News Corp. v. Hardin*, 142 U.S.App.D.C. 227, 440 F.2d 255 (1971), awarded government contracts to a competitor, *Constructores Civiles de Centro-*

*Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 45 n.25.

The court of appeals brushed aside petitioners' reliance upon this well-established line of precedent with the observation that "the rather cryptic phrasing of *Data Processing* . . . provides little guidance as to the precise nature of the requirements which must be satisfied before competitor standing can be sustained." [33]

The court then attempted, without elaboration, to distinguish *Data Processing* on the ground that it "was not a tax case." [34] The mere fact that the Internal Revenue Code is involved here, however, certainly does not render the instant action "a tax case." This case, like *Data Processing*, "is a *competitor's* suit," [35] involving a challenge to an improper administrative authorization of illegal competition by persons subject to the administrators' jurisdiction. Petitioners herein are not suing as taxpayers, or as representatives of the general public, or as guardians of some general public interest. They are suing because they themselves are being injured by the wrongful competition made possible by the actions of respondents.

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*america v. Hannah*, 148 U.S.App.D.C. 159, 459 F.2d 1183 (1972), or entered into a beneficial relationship with a competitor which enhanced its competitive position vis-a-vis the plaintiff on nongovernmental business, *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973) (alternate holding), *cert. denied*, 415 U.S. 914, 94 S.Ct. 1410, 39 L.Ed.2d 468 (1974). 548 F.2d at 390.

[33] Appendix C, at 26a. *Contra, id.* at 46a (Bazelon, C.J., dissenting); *Tax Analysts and Advocates v. Blumenthal, supra,* Appendix G, at 77a-78a; *Rental Housing Ass'n v. Hills, supra,* 543 F.2d at 390.

[34] Appendix C, at 27a.

[35] This Court, distinguishing *Data Processing* from *Flast v. Cohen*, 392 U.S. 83 (1968), stated: "*Flast* was a *taxpayer's* suit. The present is a *competitor's* suit." 397 U.S. at 152 (emphasis in original).



Finally, the majority below attempted to distinguish *Data Processing* on the ground that the relief sought in that case, if granted, would have completely barred national banks from the data processing business, whereas, even if petitioners were to prevail herein, "the AJC and other such groups will clearly remain free to pursue their travel businesses . . . ." [36] This attempted distinction either ignores or misconstrues petitioners' cause of action. Petitioners do not complain about the fact that the AJC and similar organizations conduct travel businesses. Their complaint, rather, is directed at the illegal competitive advantage conferred upon such businesses by improper administrative rulings. Reversal of those administrative rulings would, *eo instante*, eliminate the illegality complained of herein.[37]

Here, as in *Data Processing*, petitioners have alleged that improper administrative action has caused them economic injury in fact "directly traceable to the action of the [respondent] federal official[s]." *See Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 45 n.25.[38] In ruling to the contrary, the court of appeals has applied standards fundamentally in conflict with principles previously articulated by this Court.[39]

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[36] Appendix C, at 27a.

[37] Moreover, as Chief Judge Bazelon noted in dissent, the majority's purported distinction "goes only to the extent of the injury suffered, not to its speculative or hypothetical nature." Appendix C, at 45a-46a (Bazelon, C.J., dissenting). *See also Tax Analysts and Advocates v. Blumenthal, supra,* Appendix G, at 77a-78a.

[38] *See also* Appendix C, at 45a (Bazelon, C.J., dissenting).

[39] The majority, while professing adherence to this Court's ruling in *Eastern Kentucky*, has in fact created a new, virtually insurmountable barrier to standing which is clearly unwarranted by that decision. In *Eastern Kentucky*, this Court held:

**IV. The Court of Appeals Dismissed Petitioners' Complaint Without Accepting as True the Allegations of That Complaint, Without Construing the Complaint in Favor of Petitioners, and Without Providing Petitioners an Opportunity to Supply Further Particularized Allegations of Fact in Support of Their Standing to Sue. In So Doing, the Court of Appeals Has So Far Departed From the Accepted Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.**

This case came to the court of appeals from a judgment of the district court dismissing petitioners' complaint, on its merits, for failure to state a claim upon which relief can be granted. The court of appeals, *sua sponte*, ordered the parties to submit memoranda of law discussing the issue of standing in light of this Court's decision in *Simon v. Eastern Kentucky Welfare Rights Organization*, *supra*. On the basis of those memoranda, the court of appeals affirmed the dismissal of the case, not on its merits, but on the wholly different ground that petitioners lacked standing to maintain this action.[40] The

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> In sum, when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision.

426 U.S. at 38. As noted previously, the wrongful and injurious competition of which petitioners complain is clearly and immediately redressable by a favorable judicial ruling. *See* note 37 *supra* and accompanying text. Unlike the situations in *Eastern Kentucky* and *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973)—where the relief sought may or may not have removed the alleged deprivations—the benefit which petitioners here seek to attain is not dependent upon some speculative coercive effect which the requested ruling might have upon the affected third parties. Here, the ruling sought will, in and of itself, remove the illegal competitive advantage of the subject tax-exempt organizations, regardless of how those organizations react thereto. By its failure to recognize this fact, the court of appeals has undermined the principles of legal standing developed by this Court.

[40] *See* note 16 *supra* and accompanying text.



appelate court's summary disposition of this case was manifestly improper.

In *Warth v. Seldin*, 422 U.S. 490 (1975), this Court ruled that:

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.[41]

The Court went on to state that a complaint should be dismissed for want of standing only after the plaintiff has been afforded an opportunity to supply "further particularized allegations of fact deemed supportive" of standing.[42]

Clearly, the majority below did not "accept as true all material allegations of the complaint" and did not "construe the complaint in favor of the [petitioners]." To the contrary, it ignored specific allegations of competitive injury (including loss of customers), and engaged freely in speculation as to possible explanations for the competitive advantages of tax-exempt organizations and the possible impact of the relief sought by the petitioners. It denied petitioners any opportunity—by way of affidavit, discovery, or evidentiary hearing—to make a particularized showing of economic injury.

The proper course of judicial consideration of standing issues was clearly charted by this Court in *Warth v. Seldin*, *supra*. The summary and extreme departure by the court of appeals from that course in this proceeding warrants an exercise of this Court's plenary power of supervision.

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[41] 422 U.S. at 501.

[42] *Id.* at 501-02. *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 30, 1978

# APPENDICES



## APPENDIX A

### Petitioners' Complaint

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 74-1081

[Filed Jul. 19, 1974]

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GEORGE KRONENGOLD TRAVEL SERVICE, INC.
Hotel Penn Garden
7th Avenue & 31st Street
New York, New York 10001 (212) PE 6-4822

FARR TOURS
2323 Collins Avenue
Miami Beach, Florida 33139 (305) JE 1-5137

v.

WILLIAM E. SIMON
Secretary of the Treasury
15th and Pennsylvania Avenues, N.W.
Washington, D.C.

DONALD ALEXANDER, Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

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## COMPLAINT

### I. JURISDICTION

This Court has jurisdiction pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 and § 703; 28 U.S.C. § 1331; 28 U.S.C. § 1340; 28 U.S.C. § 1361; 28 U.S.C. § 2201 and 28 U.S.C. § 2202. The amount in controversy exceeds $10,000 exclusive of interest and penalties.

### II. PARTIES

1. Plaintiff, American Society of Travel Agents, Inc. (ASTA), is a non-profit corporation organized and operated under the laws of the State of New York. ASTA is a professional association of travel agents with more than 4,000 travel agent members in the United States, on whose behalf ASTA is acting in a representative capacity.

2. Plaintiff, Vega International Travel Service, is a tax-paying corporate entity organized and operated under the laws of the State of Illinois.

3. Plaintiff, Garber Travel, is a tax-paying corporate entity organized and operated under the laws of the State of Massachusetts.

4. Plaintiff, George Kronengold Travel Service, is a tax-paying corporate entity organized and operated under the laws of the State of Florida.

5. Plaintiff, Trade Wind Tours of Hawaii, is a tax-paying corporate entity organized and operated under the laws of the State of California.

6. Plaintiff, Arnold Tours, Inc., is a tax-paying corporate entity organized and operated under the laws of the State of Massachusetts.

7. Plaintiff, Columbus Travel Service, is a tax-paying corporate entity organized and operated under the laws of the State of Masschusetts.

8. Plaintiff, Fort Collins Travel Agency, Inc., is a tax-paying corporate entity organized and operated under the laws of the State of Colorado.

9. Plaintiff, Platt World Travel Service, is a tax-paying corporate entity organized and operated under the laws of the State of Illinois.

10. Plaintiff, Rex Travel Organization, Inc., is a tax-paying corporate entity organized and operated under the laws of the State of Illinois.

11. Plaintiff, Beverly Hills Travel Bureau, Inc., is a tax-paying corporate entity organized and operated under the laws of the State of California.

12. Plaintiff, George Kronengold Travel Service, is a tax-paying corporate entity organized and operated under the laws of the State of New York.

13. Plaintiff, Farr Tours, is a tax-paying corporate entity organized and operated under the laws of the State of Florida.

14. Defendant, William E. Simon, is the Secretary of the Treasury with direct responsibility for the administration of Federal income tax laws.

15. Defendant, Donald Alexander, is the Commissioner of Internal Revenue who is responsible for the assessment, levy and collection of federal taxes and various duties and responsibilities with regard to enforcement of the Internal Revenue Code of 1954, *as amended*, 26 U.S.C. § 1, *et seq.*

16. The agency plaintiffs are tax-paying travel agents who earn their livelihood through the sale of transportation, foreign and domestic tours and through arranging various other travel accommodations.



17. The commissions received by the agency plaintiffs on transportation sales are set by traffic conferences such as the Air Traffic Conference, the International Air Traffic Conference, the Transatlantic Steamship Passenger Conference and others. These conferences are regulated by the Civil Aeronautics Board and the Federal Maritime Commission, respectively.

18. The agency plaintiffs sell domestic and international inclusive tours, that is, a "travel package", in which transportation, accommodations, entertainment and frequently meals are sold together for an inclusive price. Plaintiffs receive commissions for travel and land portions of the tour. Such commissions constitute a substantial portion of the income of the agency plaintiffs and other travel agents.

## III. COUNT I

19. Tax-paying travel agents must compete with extensive travel programs operated by organizations which are exempt from federal income tax, pursuant to specific Code provisions, including 26 U.S.C. § 501(c)(3).

20. Section 501(c)(3) and the implementing Internal Revenue Service regulations are very explicit in requiring that, to qualify for an exemption, an organization must be organized and operated exclusively for one or more of the purposes enumerated in the section, namely for educational, literary, religious, charitable or scientific objectives or for the purpose of testing for public safety or preventing cruelty to children or animals. The operation of commercial travel programs is not among the enumerated purposes set forth in that section.

21. Notwithstanding the statutory terms of § 501(c)(3), and contrary to them, certain organizations which

claim to be entitled to tax-exempt status have engaged, and are engaged in the providing of commercial travel service.

22. Contrary to law, the defendants and their predecessors in office have ruled that organizations are entitled to federal tax exempt status under § 501(c)(3) and have allowed organizations to operate under the umbrella of the federal tax exemption even when they do not meet the statutory requirements for such exemption because of the large amounts of travel income which they receive each year. Further, defendants and their predecessors in office have ruled that contributions to such organizations are deductible from the taxable income of their contributors pursuant to § 170 of the Code and have caused such organizations to be listed in the IRS *Annual Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1954*, which list is published and distributed to the public as a guide to organizations, contributions to which are deductible from the donors' federal taxable income.

23. Among others, defendants have allowed the American Jewish Congress, Inc., a non-profit corporation organized under the laws of the State of New York, to maintain under their auspices and with their express approval, exemption from federal income tax, pursuant to § 501(c)(3) of the Code although defendants know that said organization has operated extensive commercial travel programs in violation of the express provisions of the Code under which defendants have ruled the organization to be exempt. Plaintiffs allege and believe that in violation of their duties of office, defendants have failed and unless ordered by court, will continue to refuse to levy, assess, and collect appropriate federal income taxes from said organization and others similarly situated.



24. Because of this tax exempt status and the other privileges which flow from it, such as reduced-rate postage, the above-named organization and others are able to offer lower-cost travel programs than plaintiffs and other tax-paying travel agents. Plaintiffs allege and believe that numerous persons who would otherwise use plaintiffs' services and the services of other tax-paying travel agents are instead induced by the extensive mail solicitations and lower costs and take business to tax-exempt organizations.

25. Further, plaintiffs and other tax-paying travel agents are being forced to bear a greater share of the public tax burden by virtue of defendants' actions in allowing tax-exempt status and deduction of contributions to organizations which are substantially engaged in commerce and do not legally qualify for such tax benefits.

26. As a direct result of defendants' action, plaintiffs and other tax-paying travel agents are losing revenue and suffering other damages and being denied the right to equal and impartial treatment under the law guaranteed by the fifth amendment to the Constitution.

## III. COUNT II

27. The allegations of paragraphs 1-27 are realleged and incorporated into this count.

28. Plaintiffs further allege that in violation of law, defendants have refused to enforce, assess and levy the unrelated business income tax imposed by § 511, *et. seq.* of the Code on tax-exempt organizations engaged in the unrelated conduct of travel enterprises, including specifically the above-named organization.

29. Plaintiffs allege and believe that defendants' predecessors in office issued a ruling dated May 15, 1970 to the above-named organization which advised the organization

that it was not liable for unrelated busines income tax on its substantial travel income.

30. The issuance of this ruling and the failure of defendants to enforce these provisions and collect the appropriate tax results in tax-exempt organizations engaging in travel having a competitive advantage over tax-paying travel agents and deprives plaintiffs of the benefits of the laws specifically enacted to protect tax-paying competitors of tax-exempt organizations.

31. Further, plaintiffs allege and believe that defendants and/or their predecessors in office have issued rulings similar to that set out in paragraph 30, to other tax exempt organizations competing with plaintiffs.

32. The defendants' failure to enforce the laws entrusted to their administration have resulted in the above-named organization, and other tax-exempt organizations having lower business costs and being able to compete for travel business unfairly with the plaintiffs who must pay the full measure of federal, state and local taxes on their income and who operate in the same travel markets as do these organizations. Further, defendants' discriminatory taxation is in derogation of plaintiffs' right to due process under the fifth amendment to the Constitution.

WHEREFORE, the plaintiffs demand a judgment as follows:

1. An order permanently enjoining the defendants from granting organizations substantially involved in unrelated travel programs, rulings exempting them from federal income tax and giving advance assurance of deductibility of contributions to such organizations and requiring withdrawal of such rulings granted to such organizations, specifically the above-named organization.

2. In the alternative, as regards the above-named and similarly situated organizations, an order requiring the



defendants to make an appropriate investigation into the activities of the said organization and to take such action as is necessary to comply with the law.

3. An order requiring defendant Commissioner to withdraw the ruling of his predecessor in office to the effect that the above-named organization is not liable for the payment of the unrelated business income tax on its income from travel operations to withdraw other such rulings and to assess and collect said tax from this and other similarly situated organizations.

4. A judgment of the Court declaring that the large-scale travel activities are unrelated to the exempt purposes enumerated in § 501(c)(3) of the Code.

5. Such other relief as the Court may deem necessary and appropriate.

Respectfully submitted,

By: PAUL S. QUINN

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PIERRE J. LA FORCE

## APPENDIX B

**Memorandum Opinion of the United States District Court for the District of Columbia**

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1081

AMERICAN SOCIETY OF TRAVEL AGENTS, INC., ET AL.,
*Plaintiffs,*

v.

WILLIAM E. SIMON AND DONALD ALEXANDER,
*Defendants.*

### MEMORANDUM-ORDER

This matter is before the Court on defendants' motion to dismiss and plaintiffs' opposition thereto. Plaintiffs are a trade association of travel agencies and twelve incorporated travel agencies. Defendants are the Secretary of the Treasury and the Commissioner of the Internal Revenue Service (hereinafter referred to either as "Defendants" or "IRS").

Plaintiffs challenge the IRS policy of granting tax exempt status to organizations which operate extensive travel programs for their members. Plaintiffs also challenge determinations by IRS not to levy the "unrelated business income tax" on income derived from travel enterprises of tax-exempt organizations. Plaintiffs complain that these determinations enable tax-exempt organizations to offer lower-cost travel programs than can be offered by commercial travel agencies, thereby damaging plaintiffs' business.

Plaintiffs seek an order enjoining IRS from granting tax-exempt status to organizations which are substantially involved in unrelated travel programs. In the alternative, plaintiffs seek an order requiring IRS to investigate tax-exempt organizations which have travel programs to see whether they qualify for tax-exempt status. Additionally, plaintiffs seek an order requiring IRS to withdraw its rulings which do not levy the "unrelated business tax" on travel income received by certain tax-exempt organizations; an order declaring that large-scale travel activities are unrelated to the exempt purposes of § 501(c) of the Internal Revenue Code (hereinafter, "the Code"); and such other relief as the Court deems appropriate.

Defendants have moved to dismiss on grounds that these issues are not justiciable, that plaintiffs lack standing to sue, and that the action is barred by the Anti-Injunction Statute of the Code,[1] the Tax Exception to the Declaratory Judgments Act,[2] and by the doctrine of Sovereign Immunity. For the reasons stated below, the Court grants defendants' motion to dismiss on the ground of nonjusticiability.

I.

Plaintiffs' first count alleges that, contrary to law, IRS has granted tax-exempt status under § 501(c)(3) of the Code to organizations that do not meet the statutory requirements for such exemptions because of the large amounts of income they receive each year from their travel programs.

Section 501(c)(3) exempts from income taxation organizations formed and operated

> exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

[1] 26 U.S.C. § 7421.

[2] 28 U.S.C. § 2201.



Plaintiffs contend that since travel is not included as an exempted purpose, any organization which conducts travel programs for its members is *ipso facto* excluded from tax-exempt status under § 501(c)(3). Plaintiffs admit that some travel activity is permissible for tax-exempt organizations. They state that they do not object to weekend camp-outs by the Girl Scouts. But they do object to the 392 foreign tours sponsored in 1974-75 by the American Jewish Congress, a tax-exempt charity. Apparently it is the *size* of the travel program offered by an organization which plaintiffs believe should be the key in determining whether that organization qualifies for tax-exempt status.

Defendants respond that according to the Code it is not the *size* of a travel program but the *purpose* of the organization offering the travel program which is the key to determining its tax status. Section 501(c)(3), *supra*, specifically states that tax-exempt status is to be determined on the basis of an organization's "purposes." Furthermore, sections 511-513 of the Code levy a tax on the "unrelated business taxable income" of an otherwise tax-exempt organization. This unrelated business tax demonstrates that commercial activity in and of itself does not destroy the tax-exempt status of an organization if that organization's *purpose* qualifies it for exemption. According to these sections of the Code, only if a tax-exempt organization's commercial activity ("trade or business") is not "substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption . . ." is the income derived by the organization from that activity taxable.

Plaintiffs reply that an organization's travel program can be so extensive that it becomes the raison d'etre of

the organization. They cite *Contracting Plumbers Co-operative Restoration Corporation* v. *United States*, 488 F.2d 684, 686 (2d Cir. 1974), *cert. denied* 419 U.S. 827, for the proposition that "the presence of a single substantial non-exempt purpose precludes exempt status regardless of the number or importance of exempt purposes."

But even conceding that such a metamorphosis can occur in a given organization's purpose, the determination of whether it has occurred can be made only upon careful consideration of the particular facts and circumstances of each case. *Passaic United Hebrew Burial Association* v. *United States*, 216 F. Supp. 500 (D.N.J. 1963); *Samuel Friedland Foundation* v. *United States*, 144 F. Supp. 74 (D.N.J. 1956). The Code will not permit a Court to issue an Order based on the premise that travel programs—even massive travel programs—are *per se* unrelated to an organization's tax-exempt purpose. Plaintiffs' first count fails to state a claim upon which relief can be granted.

II.

Plaintiffs' second count alleges that, contrary to law, IRS has refused to enforce, assess, and levy the unrelated business income tax imposed by sections 511-513 of the Code on tax-exempt organizations engaged in travel enterprises for their members. As an example plaintiffs point to IRS's treatment of the American Jewish Congress (hereinafter "AJC"). IRS has determined that AJC tours are "substantially related" to its educational and religious purposes and therefore not subject to the tax on unrelated business income.[3]

Plaintiffs seek a Court order to cause IRS to withdraw its rulings which concern the unrelated business

[3] IRS Advice Memorandum, submitted with Defendants' Motion to Dismiss, at 2.



tax on travel income received by tax-exempt organizations. But according to the Code, these rulings turn on whether the tax-exempt organization's travel activity is "substantially related" to its tax-exempt purpose(s). Plaintiffs are in effect asking the Court to substitute its discretion for that of IRS in determining which travel programs of tax-exempt organizations qualify for tax-exemption.

As defendants point out, citing *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971), *Hahn* v. *Gottlieb*, 430 F.2d 1243 (1st Cir. 1970), and *Kletschka* v. *Driver*, 411 F.2d 436 (2d Cir. 1969), this is the kind of review which courts have traditionally declined to undertake. The Court's jurisdiction may be invoked to check a specific abuse of discretion by IRS. *Eastern Kentucky Welfare Rights Organization* v. *Simon*, —— U.S.App.D.C. ——, 506 F.2d 1278 (1974). But it may not be invoked to undertake continuing supervision of IRS's administration of the Internal Revenue Code. Plaintiffs' second count fails to state a claim upon which relief can be granted.

ORDER

In light of the foregoing, it is by the Court this 22nd day of May, 1975,

ORDERED that defendants' motion to dismiss be, and it is hereby, granted.

/s/ Oliver Gasch
Judge

## APPENDIX C

**Majority Opinion of the United States Court of Appeals for the District of Columbia Circuit, Together with Dissenting Opinion of Chief Judge Bazelon**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-1782

AMERICAN SOCIETY OF TRAVEL AGENTS, INC., ET AL.,
*Appellants*

v.

MICHAEL BLUMENTHAL, SECRETARY OF TREASURY, ET AL.

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Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 74-1081)

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Argued October 20, 1976

Decided September 15, 1977

*Thomas J. Bacas*, with whom *Paul S. Quinn* was on the brief, for appellants.

*Leonard J. Henzke, Jr.*, Attorney, Tax Division, Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney, and *Ann B. Durney*, Attorney, Tax Division, Department of Justice, were on the brief, for appellees.

Before BAZELON, *Chief Judge*, MCGOWAN and ROBB, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MCGOWAN.

Dissenting opinion filed by *Chief Judge* BAZELON.*

MCGOWAN, *Circuit Judge*: This is an appeal from the District Court's dismissal of a complaint challenging the administration of the federal tax laws, not in relation to the tax liabilities of plaintiffs-appellants, but as to third parties not before the court. It thus presents a threshold issue of standing to sue reminiscent of Justice Stewart's observation, concurring in *Simon* v. *Eastern Kentucky Welfare Rights Organization, et al.*, 426 U.S. 26, 46 (1975), that he could not "imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." Because *Eastern Kentucky*—an obviously relevant case—was pending before the Supreme Court at the time this appeal was first scheduled for oral argument, we deferred our consideration to await the Supreme Court's outcome. We now hold, by reference to the Supreme Court's disposition of *Eastern Kentucky*, that there was a fatal want of standing here; and we affirm the District Court's judgment for that reason.

## I

Appellants, the American Society of Travel Agents (ASTA) and several individual travel agencies, complain of the failure of the federal tax authorities to assess taxes upon certain income received by the American Jewish Congress (AJC) and other organizations enjoying tax exemption under § 501(c)(3) of the Internal

* The dissenting opinion filed by Chief Judge Bazelon in this case is also to be filed as a dissent to No. 75-1304, *Tax Analysts and Advocates* v. *Blumenthal* (D.C. Cir., June 15, 1977).



Revenue Code.[1] In particular, they object to the tax-exempt treatment accorded to income derived from the operation of travel programs by § 501(c)(3) organizations. Appellants assert that such income should be taxed as so-called unrelated business income, *i.e.*, income obtained from a business the conduct of which is "not substantially related . . . to the exercise of performance . . . [of the] purpose or function constituting the basis" for an organization's § 501 exemption. *See* I.R.C. § 513(a). Alternatively, appellants contend that the AJC and other exempt organizations have become so heavily involved in the travel business that their § 501(c)(3) exemptions should be eliminated altogether.

By memorandum order, the District Court decided that neither count of appellants' complaint stated a claim upon which relief could be granted. 36 A.F.T.R.2d 75-5142 (D.D.C. May 23, 1975). It observed that allegations like those raised by plaintiffs would necessitate "careful consideration of the particular facts and circumstances of each case." Unwilling to embark upon such an enterprise, the court declared that its jurisdiction could "not be invoked to undertake continuing super-

[1] I.R.C. § 501(c)(3) (as amended, 1976) contains the following list of exempt organizations:

> Corporation, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

vision of IRS's administration of the Internal Revenue Code."

The District Court's reluctance to become embroiled, at the instance of taxpayers not directly involved, in the intricacies of tax law enforcement is both understandable and far from irrational in terms of jurisdictional principles. However, we believe that, looking to the Supreme Court's opinion in *Eastern Kentucky*, dismissal of appellants' action should be accomplished by resolution of the preliminary question of standing. We conclude that appellants have failed to demonstrate any actual injury resulting from appellees' administration, with respect to third parties, of the statutory provisions governing tax-exempt organizations. We find that appellants here, like the complainants in *Eastern Kentucky*, "have failed to carry [the] burden" of establishing "that, in fact, the asserted injury was the consequence of defendants' actions, or that prospective relief will remove the harm." 426 U.S. at 45, quoting *Warth* v. *Seldin*, 422 U.S. 490, 505 (1975).

II

Appellants' basic grievance may be simply stated. Private travel agents earn their livelihood, primarily on a commission basis, through the sale of transportation and travel related services in both domestic and foreign markets. One especially common function performed by travel agents is the arrangement of so-called tour packages, consisting of transportation, accommodations, meals, and a variety of other features. Such packages are sold together at one price, a portion of which the agent retains as a commission.

Appellants allege that, in recent years, a number of tax-exempt organizations, including the AJC, have become increasingly involved in preparing tour packages and offering such packages to their members. Appellants



further allege that the tax-exempt status of these organizations has enabled them to sell tour packages at prices lower than those which private travel agents must charge in order to earn a reasonable profit. Thus, so it is said, the AJC and other unspecified organizations have improperly used their tax exemptions to obtain an unfair competitive advantage in the sale of tour packages.

Operation of an extensive travel program is, in appellants' view, substantially unrelated to the religious, charitable, scientific, or educational purposes which justify many § 501(c)(3) exemptions, including that enjoyed by the AJC. Consequently, appellants urge that income from such a travel program should be subjected to the same tax treatment accorded to income earned by ordinary ASTA members. Somewhat less vigorously, appellants maintain that if the § 501(c)(3) organizations at issue conduct travel businesses of significant size, then those organizations are no longer operated "exclusively" for religious, charitable, scientific, or educational purposes, and thereby forfeit their § 501(c)(3) exemptions.

We do not reach the merits, because we believe appellants have not alleged any judicially cognizable "injury in fact," and thus have failed to establish their standing to bring this suit. "Injury in fact" has long been regarded as the foremost standing prerequisite, and the only one of constitutional dimension. *See, e.g., United States* v. *SCRAP*, 412 U.S. 669, 686-89 & n. 14 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); and *Flast* v. *Cohen*, 392 U.S. 83, 99-101 (1968). Under Article III of the Constitution, federal courts are limited to the adjudication of cases and controversies. In order to guarantee the adversarial litigation posture demanded by this constitutional language, plaintiffs seeking to invoke federal court jurisdiction have been required to demonstrate that they have suffered some actual injury attributable to defendants.

Here, appellants claim to have been injured by appellees' improper administration of the Internal Revenue Code, and seek injunctive relief. However, appellants have not indicated with sufficient specificity either the manner in which their alleged injury occurred or the nature of that injury. Appellants point to no prospective customers who spurned the services of ASTA members because of appellees' allegedly inequitable tax treatment of § 501(c)(3) organizations. Nor do appellants identify tour package purchasers who in fact patronized the AJC or some other tax-exempt organization, but who might legitimately be expected to do business with a private travel agent in the event appellees enforced the relevant tax code provisions according to appellants' recommendations. Instead, appellants complain in more abstract terms, alleging injury arising from appellees' creation of an unfair competitive atmosphere, and seeking relief in the form of the more congenial competitive environment which would supposedly result from proper tax enforcement policy. We regard this sort of injury claim as too speculative to support standing under the circumstances presented here.

We conceive that this disposition is not only sustained, but also largely mandated, by *Eastern Kentucky*. In that case, several indigents and organizations composed of indigents attacked a 1969 Revenue Ruling which revised the criteria under which non-profit hospitals might qualify for tax-exempt status as charitable institutions. In particular, the challenged ruling eliminated the requirement contained in a 1956 ruling to the effect that a non-profit hospital desirous of charitable classification "must be operated to the extent of its financial ability for those not able to pay for the services rendered." Deletion of this language, argued the *Eastern Kentucky* plaintiffs, was directly responsible for several refusals by tax-exempt hospitals to provide needed services to indi-



viduals unable to pay a deposit or advance fee. Plaintiffs further alleged that similar refusals could be expected in the future if the offending Revenue Ruling was not changed.

As indicated above, the Supreme Court held that "[s]peculative inferences are necessary to connect [plaintiffs'] injury to the challenged actions . . .," and "[m]oreover, the complaint suggests no substantial likelihood that victory in this suit would result" in receipt of the hospital treatment desired. 426 U.S. at 45-46. The Court explained its conclusion by commenting upon what it perceived as the tenuous connection between the injury suffered and the relief sought by plaintiffs:

> [I]t does not follow . . . that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire. It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.
>
> It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.[2]

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[2] Justice Powell's opinion for the Court made clear that the finding of a standing deficiency in *Eastern Kentucky* rested upon a constitutional foundation.

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to him-

*Id.* at 42-43.

ASTA's complaint in the appeal before us reveals inadequacies closely comparable to those which afflicted the pleadings filed by the indigents and indigent organi-

---

self that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.

* * * *

The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.

* * * *

The standing question in this suit therefore turns upon whether any individual respondent has established an actual injury, or whether the respondent organizations have established actual injury to any of their indigent members.

* * * *

[T]he "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant. . . .

*Id.* at 38-41 (footnotes omitted).

In a recent case decided by another panel of this court, inquiries relating to causation and redressability of an alleged injury are characterized as "prudential limitations." Tax Analysts and Advocates v. Blumenthal, No. 75-1304, slip op. at 11-12 (D.C. Cir. June 15, 1977); and *see also* Harrington v. Bush, No. 75-1862, slip op. at 28 n. 68 (D.C. Cir. Feb. 18, 1977), where such inquiries are portrayed as being separate and apart from the "constitutional threshold of injury-in-fact." The implication of these statements is that, although considerations of causation or redressability may conceivably operate to deprive particular plaintiffs of standing, such factors can in no event rise to the level of constitutional significance. Justice Powell's words in *Eastern Kentucky*, especially the passages quoted above, are at odds with this approach. Causation and redressability, far from being prudential matters to be evaluated *seriatim* only after constitutional standing has been established, are part and parcel of the "injury in fact" requirement arising from the "case or controversy" language in Article III. Causation and redressability thus represent not additional independent standing hurdles which prospective litigants must clear, but rather identifiable aspects of the "injury in fact" test which has long been recognized as the primary standing criterion in the federal courts.



zations in *Eastern Kentucky*. Appellants here must rely solely on speculation in their attempt to assert that their business or profits would improve in the event that appellees began to tax the travel-related income of § 501(c)(3) organizations. Appellants have not demonstrated that they would reap any tangible benefit if the court were to order the relief sought.

As appellees argue in their supplemental memorandum, the lower cost of the tour packages offered by the AJC and other tax-exempt organizations may well be attributable at least in significant part to the use of volunteer labor or the willingness to accept lower profits than would commercial travel agents. Moreover, even if appellants were to prevail in this suit, members of § 501(c)(3) organizations might for a variety of reasons continue to prefer the travel programs operated by their own organizations. Alternately, such organizations might shift to tour packages whose religious or educational orientation would be more readily apparent. A third possibility is that travel by members of § 501(c)(3) organizations would simply decline.

If any of these consequences, or some combination of them, ensued from a decision favorable to appellants, private travel agents would enjoy no gain whatever from their successful litigation. This is precisely the sort of situation in which the Supreme Court failed to find standing in *Eastern Kentucky*.[3]

By emphasizing their asserted competitor status, appellants seek to distinguish *Eastern Kentucky*. Appellants

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[3] Although Justice Stewart's concurring statement in *Eastern Kentucky* dramatically denotes the special problems attendant upon the establishment of standing in the tax cases, under the circumstances of this case we find, as did the *Eastern Kentucky* majority, no need to reach "the question of whether a third party ever may challenge IRS treatment of another." 426 U.S. at 37. The conventional "injury in fact" prerequisite was simply not met by appellants in the record before us.

contend that, as competitors of the AJC and certain other § 501(c)(3) organizations, they are entitled to protest tax treatment of such organizations in federal court.[4] For support of their position, appellants rely heavily on *Association of Data Processing Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). In that case, the Court held that private competitors had standing to challenge a ruling by the Comptroller of the Currency which allowed national banks to provide data processing services to other banks and bank customers. Appellants emphasize that the Supreme Court has, in its *Eastern Kentucky* opinion, recently reaffirmed the vitality of the *Data Processing* decision. *See* 426 U.S. at 45 n.25.

Our response is threefold. First, the rather cryptic phrasing of *Data Processing* does not clearly define the contours of competitor standing as conceived by the Supreme Court. The opinion by Justice Douglas for the Court provides little guidance as to the precise nature of the requirements which must be satisfied before competitor standing can be sustained.[5]

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[4] Appellants also rely on their competitor status to establish that they are within the "zone of interests to be protected or regulated by" the relevant Internal Revenue Code provisions. The so-called "zone of interests" test stems from the Supreme Court's companion opinions in Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970) and Barlow v. Collins, 397 U.S. 159, 164-65 (1970). As the Court observed in *Eastern Kentucky*, the "zone of interests" test presents "a second, nonconstitutional standing requirement." 426 U.S. at 39 n.19. In an effort to demonstrate that the "unrelated business" concept was incorporated into the Code in order to protect competitors of tax-exempt organizations, appellants point to both the legislative history of I.R.C. § 513 and the regulations promulgated regarding that section. *See, e.g.*, H.R. REP. No. 2319, 81st Cong., 2d Sess. 36 (1950); S. REP. No. 2375, 81st Cong., 2d Sess. 27-31 (1950); and 26 C.F.R. § 1.513-1(b) (1976). Given our disposition of this case under the "injury in fact" rubric, we need not address appellants' "zone of interests" argument.

[5] Two examples may be cited. The first involves the identity of the parties who must be sued by a litigant alleging competitor standing. In *Data Processing*, one of the respondents was American National Bank & Trust Company, a national bank which was offering data processing services pursuant to the controverted ruling by the Comptroller of the Currency. Justice Douglas's opinion does not disclose whether a successful claim of competitor standing necessitates naming one or more specific competitors as party opponents. Here, only the Secretary of the Treasury and the Commissioner of Internal Revenue were named as defendants. No organizations holding § 501(c)(3) tax exemptions were made parties. We note that in *Eastern Kentucky*, Justice Powell stressed the fact that no tax-exempt hospital was a defendant. *See* 426 U.S. at 41. Also omitted from the *Data Processing* opinion was all discussion of the chain of causation connecting the challenged administrative action to the injury allegedly suffered by competitors of regulated enterprises. That chain was patently much shorter and more direct in *Data Processing* than it is in this case.



Secondly, and more significantly, *Data Processing* was not a tax case. Whatever may be the impact of competitor standing when ordinary administrative action is at issue, we do not believe that *Data Processing* should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor.

Finally, § 501(c)(3) organizations occupy a different posture with respect to the sale of tour packages than did the national banks with respect to the provision of data processing services. Here, the AJC and other such groups will clearly remain free to pursue their travel businesses, however the tax status is finally resolved. By contrast, in *Data Processing*, if the Comptroller of the Currency's ruling had been overturned on judicial review, the offering of data processing services by national banks would have been *illegal*, and petitioners undoubtedly would have faced no further competition from that source, absent statutory revision.

For all these reasons, we do not believe that the *Data Processing* decision controls the standing issue in the

present litigation.[6] Since we are convinced that the *Eastern Kentucky* analysis of standing is the one we are bound to apply in this case, and that under it appellants lacked standing to maintain this suit, the judgment of dismissal is affirmed.[7]

*It is so ordered.*

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[6] In *Tax Analysts, supra* note 2, a panel of this court recently found economic injury in fact, adequate to meet the Article III test of standing. Appellant in that case was the owner of a small domestic oil well. Rightly or wrongly, he characterized himself as a competitor of the major oil companies producing and importing oil from abroad. He claimed to have suffered economic harm because the IRS had acquiesced in the tax credit treatment of certain sums paid by large oil companies to foreign governments. Appellant in *Tax Analysts* asserted that these sums represented foreign excise taxes or royalties, not foreign income taxes, and that therefore, they should be treated as deductible business expenses, not tax credits. Having found such allegations sufficient to establish injury in fact, the *Tax Analysts* panel then addressed the prudential "zone of interests" test, and found that the court house door was barred on that score. By reason of this latter finding, the panel did not think it necessary to pursue what it termed the "two additional prudential limitations relating to causation and redressability of the grievance. . . ." Slip op. at 11-12 (footnote omitted); and see note 2 *supra*.

[7] The dissent observes of the foregoing opinion that "it constructs a constitutional standard of injury in fact that would effectively preclude taxpayer suits claiming competitive injury." The word "constructs" is hardly an apt characterization of the majority's effort, in purpose and effect, to follow as faithfully as possible the Supreme Court's disposition of *Eastern Kentucky*—the case which, prior to that disposition, all members of the panel appeared to regard as almost certainly controlling.

It would thus seem that the dissent's quarrel is essentially with the approach taken by the Supreme Court majority in *Eastern Kentucky*, and not with anything the panel majority has itself contrived. The dissent asserts that that approach is an impolitic and unwarrantable return to the rigors of common law pleading, and one that is incompatible with a rational determination of assessibility to the federal courts. Although in this instance the dissent purports to see distinctions which enable it to assert that *Eastern Kentucky* was rightly denied by the Supreme Court, it is manifest that this is not an undertaking it finds either necessary or congenial. As is usually the case in such circumstances, the differ-



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entiations here made in terms of economic probabilities are less than conclusive.

It is no disrespect to the Supreme Court to say that the concept of standing appears to be undergoing development. *Warth* v. *Seldin, supra*, and *Eastern Kentucky*, with their new emphasis upon causation and redressability, indicate that at least a majority of the Court is no longer content with a constitutional concept of injury in fact limited to an assurance that the interest asserted will guarantee an effective adversarial presentation. Causation and redressability have now explicitly been comprehended within that concept. Whether this is only a tightening up of pleading requirements, or whether it is a way station on the road to a holding of nonjusticiability in certain classes of litigation, neither we nor the dissent can say. In such circumstances it is surely the function of an intermediate appellate court to be guided by standing requirements as they are currently articulated by the Supreme Court in closely comparable contexts.

BAZELON, *Chief Judge, dissenting* in No. 75-1304, *Tax Analysts and Advocates* v. *Blumenthal*, and in No. 75-1782, *American Society of Travel Agents, Inc.* v. *Blumenthal*: Two panels of the Court hold, for partially inconsistent reasons, that a taxpayer suffering competitive injury lacks standing to challenge tax rulings applicable to a third party. Because I disagree with the reasoning of both panels, I must respectfully dissent.

I have decided to write a common dissent on both decisions because I believe that, although each panel develops a different aspect of standing doctrine, both are in fact responding to a common but implicit apprehension of taxpayer standing.[1] I share that apprehension. The spectre of the Internal Revenue Service (IRS) defending a multiplicity of suits challenging the tax liabilities of third parties is not a happy one.[2] Taxes and courts are a volatile political combination; our jurisdiction in this area

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[1] The majority opinion in No. 75-1782, American Society of Travel Agents, Inc. v. Blumenthal, states with admirable candor that the case "presents a threshold issue of standing to sue reminiscent of Justice Stewart's observation, concurring in *Simon* v. *Eastern Kentucky Welfare Rights Organization, et al.*, 426 U.S. 26, 46 (1975), that he could not 'imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.'" Maj. op. at 2. Although the opinion does not directly address this question, it constructs a constitutional standard of injury in fact that would effectively preclude taxpayer suits claiming competitive injury. The majority opinion in No. 75-1304, Tax Analysts and Advocates v. Blumenthal, explicitly declines to address the issue of "whether a third party ever made challenge IRS treatment of another." Maj. op. at 27 n.90. However, the discussion of the "zone of interests" test in the opinion seems designed, "as a prudential matter," *id.* at 26, to eliminate such challenges from a federal forum.

[2] On the other hand, it must be recognized that the Code is a statutory system designed delicately to balance the relationships among economic entities. To permit tax liability to be challenged only by the taxpayer himself is in effect to permit the IRS virtually



has for that reason been circumscribed by statute.[3] But whether a federal forum should be closed to such suits is a profound and complicated issue, and at base one that should be decided by Congress. At present Congress has decided that we do have jurisdiction to hear cases such as those presently before us,[4] and we are obligated to exercise this statutory jurisdiction.

Appellants have alleged circumstances that would have justified standing had they been seeking review of an ordinary administrative ruling. What concerns me most deeply about these decisions is that both deny appellants

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unfettered discretion in adjusting these economic interrelationships. The spectre of such unreviewable discretion, especially when, as is alleged in these two cases, it is exercised in contradiction to the commands of Congress, is also discomforting.

[3] 26 U.S.C. § 7421(a), for example, provides that, except in certain exceptional circumstances, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The purpose of the statute is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." Enochs v. Williams Packing and Navigation Co., Inc., 370 U.S. 1, 7 (1962). Our jurisdiction is similarly limited in the area of federal taxes by the Declaratory Judgment Act, which authorizes courts of the United States to issue declaratory judgments "except with respect to Federal taxes. . . ." 28 U.S.C. § 2201.

[4] In Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 36-37 (1976), the Supreme Court specifically left open the question of whether statutory or immunity bars would ever permit a third party to "challenge IRS treatment of another." This court has held, however, that since 26 U.S.C. § 7421(a) only forbids suits instigated "for the purpose of *restraining* the assessment or collection of any tax," (emphasis added), it does not bar suits seeking to compel the *collection* of taxes. Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278, 1284 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976). We have also held that the scope of the prohibition in the Declaratory Judgment Act, 28 U.S.C. § 2201, is "coterminous" with that of 26 U.S.C. § 7421(a), *id.* at 1284-85, and hence that in suits seeking to compel the collection of taxes we are authorized to provide declaratory relief.

standing not on principles specifically applicable to taxpayers suits, but on the basis of general doctrines of the law of standing. The consequence is that general standing law is distorted to accommodate the purpose of shielding the IRS.

In No. 75-1782, *American Society of Travel Agents, Inc.* v. *Blumenthal*, appellants, numerous commercial travel agencies and the American Society of Travel Agents (ASTA), a non-profit corporation organized to represent the professional interests of travel agents, allege that certain organizations tax exempt under 26 U.S.C. § 501(c)(3),[5] and the American Jewish Congress (AJC) in particular, actually package and offer to the public large scale commercial travel programs. Appellants argue that such commercial activities are illegal in corporations exempt under § 501(c)(3),[6] and that appellants are injured by this illegality since tax-exempt organizations can offer travel programs more cheaply than tax-paying organizations.[7] They ask that the AJC and similar organizations be deprived of their tax-exempt status, or, in the alternative, that income from these

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[5] 26 U.S.C. § 501(c)(3) exempts from taxation

> [c]orporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[6] Complaint ¶¶ 22, 23.

[7] *Id.* at ¶ 24.



commercial programs be taxed under 26 U.S.C. § 511(a).[8] The majority holds that appellants fail to meet the Article III requirement of injury in fact. Because I believe that appellants have alleged ordinary competitive injury sufficient to meet the standards set out in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970), I dissent from this holding.

In No. 75-1304, *Tax Analysts and Advocates* v. *Blumenthal*, the majority denies standing to appellant Tax Analysts and Advocates (TAA), a non-profit corporation organized for the purpose of promoting tax reform, and to appellant Thomas Field, a United States taxpayer and owner of the entire working interest in a currently producing oil well in Pennsylvania. Appellants seek to challenge published[9] and private[10] rulings by the IRS that taxes imposed by Saudi Arabia, Libya, Iran, Kuwait and Venezuela are "income" taxes, and thus can be credited against U.S. tax liability under 26 U.S.C. § 901(b).[11] Appellants allege that these taxes are in fact either royalties or "excise, severance, or similar taxes not creditable under Section 901(b)."[12]

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[8] 26 U.S.C. § 511(a) imposes on corporations subject to § 501(c)(3) a tax on "unrelated business taxable income." "Unrelated business" is defined in § 513(a) to mean

> any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 . . . .

[9] *See* Revenue Ruling 55-296, 1955-1 Cum. Bull. 386; Revenue Ruling 68-552, 1968-2 Cum. Bull. 306.

[10] *See* Amended complaint ¶ 10, Joint Appendix (JA) at 41.

[11] 26 U.S.C. § 901(b) permits a U.S. citizen or domestic corporation to receive a tax credit for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country . . . ."

[12] Amended Complaint ¶ 14, JA at 42.

Appellant Field and appellant TAA as a representative of its tax-paying members, claim injury as taxpayers. They allege that the illegal IRS rulings cost the U.S. Treasury approximately $3,000,000,000 in 1974, and argue that this loss causes them to pay higher federal income taxes.[13] Appellant Field, in addition, claims that he is injured as a competitor of those oil companies who benefit from the illegal IRS rulings. Field alleges that since the prices charged by these companies for imported oil largely determine the market price for the uncontrolled crude oil of domestic independent producers, he receives a lower price for his oil than would be the case if such companies could only deduct these foreign taxes from their gross income rather than illegally credit them.[14] Moreover, since domestic producers can only deduct the royalties they pay to the land owners of their oil wells,[15] Field claims that investment in foreign oil production is relatively more profitable and attractive. Field alleges that the IRS rulings thus "depress the value of his operating interest in a domestic oil well." [16]

The majority denies standing to both Field and the TAA in their capacities as mere taxpayers.[17] Because as taxpayers appellants have not met the "nexus" text of

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[13] Amended Complaint at ¶¶ 14, 20, 21, JA at 42, 44.

[14] Amended Complaint at ¶ 18, JA at 43-44.

[15] Appellant Field pays a royalty of one-eighth of the proceeds of all oil produced from his well to the owners of the land on which the well is located. These royalties are expected to amount to $46.32 per year for the next five years. See the findings of the District Court, Tax Analysts and Advocates v. Simon, 390 F. Supp. 927, 929-30 (D.C.C. 1975).

[16] Amended Complaint ¶ 19, JA at 44.

[17] The majority affirms the District Court's finding of no injury in fact and adopts its reasoning at 390 F. Supp. 932-38. Maj. op. at 4 n.10.



*Flast* v. *Cohen*, 392 U.S. 83, 102-03 (1968),[18] and have alleged only a "generalized grievance" the impact of which "is plainly undifferentiated and 'common to all members of the public . . .' *Ex parte Lévitt*, 302 U.S. 633, 634 (1937)," [19] I concur in that holding.[20]

The majority also denies appellant Field standing. It concedes the Field has suffered injury in fact sufficient to meet Article III standards,[21] yet it finds that Field has failed the second of the standing tests enunciated in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). It concludes that the interests Field seeks to protect are not "arguably within the zone of interests to be protected or regulated" by § 901(b). In reaching this conclusion the majority is forced to construe the "zone of interests" test in an unsupportable manner, capable of causing unforeseeable

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[18] *Flast* focused on the "logical nexus between the status asserted and the claim sought to be adjudicated." The decision held that there were two aspects to the nexus required to sustain taxpayer's standing. "First, the taxpayer must establish a logical link between [federal taxpayer] status and the type of legislative enactment attacked . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102.

[19] United States v. Richardson, 418 U.S. 166, 176-77 (1974).

[20] I do not agree, however, with the majority's conclusion that appellants have suffered no injury in fact. Maj. op. at 4 n.10. A generalized grievance is a grievance nonetheless. Since injury in fact is a constitutional prerequisite of standing, the taxpayer in *Flast* must have suffered such an injury. Nevertheless, the Supreme Court has held that as a prudential matter, a grievance "shared in substantially equal measure by all or a large class of citizens" should normally not "warrant exercise of jurisdiction." Warth v. Seldin, 422 U.S. 490, 499 (1975). Congress can, of course, "either expressly or by clear implication" override this prudential consideration. *Id.* at 501. Appellants, however, have pointed to no statute in which Congress has either expressly or implicitly authorized a right of action for generalized taxpayer grievances.

[21] Maj. op. at 12.

mischief in other areas of standing law. I dissent both from the majority's conclusion and from its construction.

## I. Injury in Fact

Article III of the Constitution limits federal court jurisdiction to actual cases or controversies. The question of standing "focuses on the party seeking to get his complaint before a federal court," *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968), in order to determine if he "has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). Two aspects of the case and controversy standard are important for the law of standing. The first is that cases and controversies must be adversary; that is, they must be disputes over actual or threatened injuries. Thus standing exists "only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .' *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 (1973)." *Id.* at 499. Second, cases and controversies must "be presented in a form historically viewed as capable of judicial resolution." *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968). Thus federal courts cannot, consistent with Article III, issue advisory opinions. *Id.* at 96-97. Standing requires that a plaintiff demonstrate "an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).[22] *Eastern Kentucky* makes clear that an injury capable of being redressed is one that can fairly "be traced to the challenged action of the defendant, and not

[22] *See* United States v. Evans, 213 U.S. 297 (1909).



injury that results from the independent action of some third party not before the court." *Id.* at 41-42.[23]

It is, of course, settled law that in appropriate circumstances competitive injury constitutes sufficient injury in fact to fulfill Article III requirements.[24] This is acknowledged by the opinion in *Tax Analysts*.[25] In that case appellant Field owns the entire working interest in a Pennsylvania oil well. The well produces three barrels of crude oil per month at a price of $10.28 per barrel. Field's anticipated profits before taxes are approximately $203.76 per year.[26] He complains of economic injury because allegedly illegal IRS rulings have decreased the value of his well and the price he receives for his crude oil.

At first blush it is tempting to hold such economic injury, if it exists, to be *de minimis*. However, it is apparent that there can be no principled justification for such a holding, and the Supreme Court has held that any identifiable trifle of harm is enough to establish standing. *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973). It is also tempting to hold that Field's injury is too speculative. While it is true that we cannot know with absolute certainty whether the elimination of the allegedly illegal IRS ruling would redress Field's

[23] Like the majority in *Travel Agents*, I disagree with the observation in *Tax Analysts* that "causation" and "redressability" are merely "prudential limitations" on standing. See *Tax Anaylsts* at 11-12; *Travel Agents* at 8 n.2.

[24] Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 223 (1974); Sierra Club v. Morton, 405 U.S. 727, 736-37 & n.11 (1972); Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

[25] Maj. op. at 12.

[26] 390 F. Supp. at 929.

competitive injury, he has set forth a cogent economic analysis that this would be the case. To require Field to allege facts that would prove the laws of economics would be ungainly, wasteful, and inconsistent with the philosophy of pleading of the Federal Rules of Civil Procedure. The modern conception of "notice pleading" [27] does "not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). Requiring Field to allege all of the facts supportive of the chain of causation upon which his allegation of injury rests would return us to the unpredictable and fact-laden system of code pleading.[28]

Recognizing all this, the majority in *Tax Analysts* holds that Field "has suffered injury in fact in his capacity as a competitor." [29] I concur in this holding. And, so far as I can see, the competitive injury that ASTA and the other appellants in *Travel Agents* claim to have suffered is virtually indistinguishable. Yet the majority in that case holds that appellants have no standing because they have failed to demonstrate "any judicially cognizable 'injury in fact.'" [30]

The majority in *Travel Agents* holds, first, that the very existence of appellants' competitive injury is "too

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[27] Wright and Miller object to the term "notice pleading" and suggest instead "modern pleading" or "simplified pleading." WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1202 (1969).

[28] *See id.*; 2A MOORE'S FEDERAL PRACTICE ¶¶ 8.12-8.13 (1975); CLARK, CODE PLEADING § 38 (1947); Skinner, *Pre-Trial and Discovery Under the Alabama Rules of Civil Procedure*, 9 ALA. L. REV. 202, 203-05 (1957).

[29] Maj. op. at 12. The majority terms the government's arguments to the contrary "frivolous." *Id.* at 12 n.45.

[30] Maj. op. at 5.



speculative to support standing" since they do not allege specific customers who would be gained if the AJC and similar organizations were to lose their tax-exempt status.[31] Second, the majority concludes that "[a]ppellants have not demonstrated that they would reap any tangible benefit if the court were to order the relief sought." [32] If the tax-exempt status of the AJC or other tax-exempt organizations were eliminated, these organizations might still maintain lower prices because of "volunteer labor or the willingness to accept lower profits"; or members of these tax-exempt organizations might still prefer the travel programs of their own organizations even if more expensive; or such members might simply decide not to travel at all.[33]

With all due respect, such reasoning reveals that it is the majority, not the appellants, who is engaging in speculation. The economic basis of appellants' injury is straightforward, far more compelling even than that alleged by appellant Field in *Tax Analysts*. Appellants allege that because of the AJC's

> tax-exempt status and the other privileges which flow from it, such as reduced-rate postage, the [AJC] and others are able to offer lower-cost travel programs than plaintiffs and other tax-paying travel agents. Plaintiffs allege and believe that numerous persons who would otherwise use plaintiffs' services and the services of other tax-paying travel agents are instead induced by the extensive mail solicitations and lower costs and take business to tax-exempt organizations.[34]

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[31] *Id.* at 6.

[32] *Id.* at 9.

[33] *Id.*

[34] Complaint ¶ 24.

It is true, of course, that all claims of competitive injury are to some extent speculative, since they are predicated on the independent decisions of third parties; *i.e.*, customers. However economics is the science of predicting these economic decisions, and it is the stuff of the most elementary economic texts that if two firms are offering a similar product for different prices, the firm offering the lower price will draw away customers from its competitor. For us to fly in the face of this learning and require a plaintiff to *allege in his complaint* the names of specific customers who would be led to alter their consumption patterns, would be to exalt form over substance and to take a long, unfortunate step backwards into what Professor Moore has termed "the morass" of code pleading.[35] I know of no case, nor has one been cited by the majority, in which such allegations have been adjudged a necessary element in a complaint of competitive injury.[36]

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[35] 2A MOORE'S FEDERAL PRACTICE ¶ 8.13 (1975). Stripped to its essentials, the majority's argument is that appellants have alleged conclusions rather than facts. However, under the philosophy of the Federal Rules, "it is immaterial whether a pleading states 'conclusions' or 'facts' as long as fair notice is given . . . ." *Id.*

[36] *See* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Rental Housing Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388 (1st Cir. 1977); Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 33 (3d Cir. 1976).

It is unclear to me exactly what facts the majority would require to be alleged. Surely an affidavit from a tour package purchaser swearing that *he would have patronized a commercial travel agency had its prices been competitive* would constitute the height of speculation. *See* American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1 (1960), in which the Court concluded that trucking companies had standing under § 205(*g*) of the Interstate Commerce Act and § 10(a) of the Administrative Procedure Act to challenge the ICC's granting of a permit to a competitor to perform transportation services for appellee General Motors Corporation, *despite GM's statement in court that it would not do business with appellants.* The Court stated, "And surely the statement by General Motors that it would not in any event give the business to any appellant



The majority's reasoning, in fact, is flatly contradictory to *Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971). In that case plaintiffs complained of competitive injury because of an allegedly illegal regulation of the Comptroller of the Currency permitting national banks to establish and operate collective investment funds. The Supreme Court upheld the standing of the plaintiffs, *id.* at 620-21, even though their allegations of injury were no more specific that those of the appellants in this case. Plaintiffs alleged merely that they would

> suffer present and continuing serious and irreparable injury as a direct result of the illegal activity authorized by the Comptroller's challenged regulations and particularly as a result of the Bank's proposed illegal activity which was approved by the Comptroller under such regulations. This illegal activity will subject the Institute's mutual fund members to illegal competition, will deprive them of legitimate business, and will dilute, divert, and withdraw a substantial portion of the potential market for securities in mutual funds to the substantial and irreparable injury of such plaintiffs and the shareholders in such funds. This illegal activity will also subject the Institute's investment adviser and underwriter members, including the additional plaintiffs, to illegal competition and to loss of opportunities for profit in their trade and will dilute, divert and withdraw a substan-

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cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. The decision we believe to be controlling is . . . *Alton R. Co.* v. *United States*, 315 U.S. 15, where the Court confirmed the standing of a railroad to contest the award of a certificate to a competing trucker." *Id.* at 17-18.

tial portion of the potential market for their services to the irreparable injury of such plaintiffs.[37]

The Supreme Court did not, as does the majority in this case, require plaintiffs to allege in their complaint facts sufficient to refute every possible anomaly of the marketplace such as the existence of voluntary labor or ideologically committed consumers. The Court assumed that the marketplace would function in a normal, predictable fashion,[38] for to assume otherwise would be to foreclose the very possibility of ever satisfactorily alleging a competitive injury. As the majority's opinion demonstrates, one might conjecture an indefinite number of such anoma-

[37] Complaint ¶ 18. *Investment Co. Institute* v. *Camp* was a consolidation of two cases, No. 61, Investment Co. Institute v. Camp, and No. 59, National Ass'n of Securities Dealers, Inc. v. SEC. The complaint quoted in text is from No. 61, the case in which the Supreme Court specifically upheld standing.

Just last year, this court accepted jurisdiction of a case in which plaintiffs had obtained standing on the basis of a complaint reading very much like the complaint in the instant case. Plaintiffs alleged competitive injury, yet named no specific customers who had been lost. This court not only accepted plaintiffs' standing, but also upheld the district court injunction because it was necessary to protect these plaintiffs from "further economic and competitive injury." Independent Bankers Ass'n v. Smith, 534 F.2d 921, 952 (D.C. Cir.), *cert. denied sub nom.* Bloom v. Independent Bankers Ass'n, 429 U.S. 862 (1976); Complaint ¶ 31.

[38] The assumption is a common one. For example, in cases under the Robinson-Patman Act, 15 U.S.C. § 13, "competitive injury may be inferred when one set of customers buys at substantially lower prices than other customers." Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974). *See* FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948): "Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." The injury, of course, may be inferred because merchants faced with higher prices and therefore higher costs must in turn charge their customers higher prices and thereby lose business and suffer competitive injury. This is precisely the chain of economic reasoning relied upon by appellants in *Travel Agents*.



lies, some more plausible than others. For every anomaly invented, the plaintiffs' claim can be made to appear more "speculative." Standing under such access rules would virtually depend upon the imagination of the reviewing judge.

The majority argues that its conclusion is required by *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). I disagree. In *Eastern Kentucky*, plaintiffs alleged that a 1969 Revenue Ruling has "encouraged" hospitals to deny services to indigents.[39] Under the tax code, benefactors of institutions qualifying as "charitable" under § 501(c)(3) can deduct the amount of their donations. Plaintiffs alleged that the new Revenue Ruling, by permitting hospitals that offered only emergency room services to indigents to qualify for § 501(c)(3) status, "caused" the refusal of various hospitals to admit indigent plaintiffs. The premise of the plaintiffs' argument was that hospitals were so dependent upon deductible donations that they would perform whatever services were necessary to qualify for § 501(c)(3) status. That premise, as a logical or economic prediction, was clearly false: there was no way of knowing in advance whether the increased income from charitable contributions would exceed the increased costs of providing additional services. The result, as the Supreme Court observed, would "vary from hospital to hospital." *Id.* at 43. Plaintiffs had thus failed to allege facts sufficient to predict whether the change in the Revenue Ruling would affect the behavior of those particular hospitals that had refused to admit the plaintiffs.

*Eastern Kentucky* applies to fundamentally different circumstances than those presented in *Travel Agents*. The injury alleged by ASTA and the other appellant travel agencies does not depend upon the discreet decisions of

[39] 426 U.S. at 42.

particular institutions or specific customers. Appellants allege a competitive injury, stemming from a systematic distortion of the marketplace. They claim that, because of illegal IRS rulings, their competitors pay no taxes and therefore have lower costs and charge lower prices. There is nothing hypothetical about this allegation: if we grant the relief appellants seek, the costs of their competitors would necessarily increase. The ultimate injury alleged is a loss of customers, and there is, of course, an implicit prediction in appellants' case that customers will, on the whole, tend to buy similar items at the lowest possible price. The majority can refer to this injury as "abstract" and to this prediction as "speculative," but these are abstractions and speculations that every businessman must confront every day.[40] The majority's corrosive skepticism would altogether eliminate competitive injury as a grounds for standing.[41] That would in fact be contrary

[40] Article III, of course, does not require *absolute certainty* that prospective relief will redress the alleged harm. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976); City of Hartford v. Towns of Glastonbury, West Hartford, and East Hartford, Nos. 76-6049, -6050, -6059, slip op. at 1098 (2d Cir. 23 December 1976). This court, for example, has held that an unsuccessful bidder for a government contract has standing to challenge the validity of the awarding of the contract, even though the plaintiff has "no right . . . *to have the contract awarded to it* in the event the district court finds illegality in the award . . . ." (Emphasis added.) Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 864 (D.C. Cir. 1970). *See* Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975); Hayes International Corp. v. McLucas, 509 F.2d 247 (5th Cir.), *cert. denied*, 423 U.S. 864 (1975); William F. Wilke, Inc. v. Department of Army, 485 F.2d 180 (4th Cir. 1973); Merriam v. Kunzig, 476 F.2d 1233 (3d Cir.), *cert. denied sub nom.* Gateway Center Corp. v. Merriam, 414 U.S. 911 (1973).

[41] I share, of course, the majority's concern "to follow as faithfully as possible" *Eastern Kentucky*. Maj. op. at 13 n.7. We differ in our reading of that case, not in our respect for the precedents of the Supreme Court. The majority seems to have taken from *Eastern Kentucky* the concepts of "causation," "redressability," and "speculation," without, in my view, adequate appreciation of the malleableness—not to say vagueness—of these ideas. They are the



to the teaching of *Eastern Kentucky*, since the decision explicitly reaffirmed *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970). Standing was appropriate in *Data Processing*, the Court said, because in that case the complaint had "alleged injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action." 426 U.S. at 45 n.25.

In *Travel Agents* appellants also allege "injurious competition" that is "directly traceable to the action of the defendant federal official." The majority attempts to distinguish *Data Processing* by arguing that the relief requested in that case was the total elimination of the allegedly illegal competition, whereas in *Travel Agents* "the AJC and other such groups will clearly remain free to pursue their travel businesses, however their tax status is finally resolved." [42] This distinction, however, goes only

kind of standards that acquire meaningful content only in application to particular circumstances. *See* Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 681-88 (1977). The claim of competitive injury was not addressed in *Eastern Kentucky*, and the majority's result is therefore not required by that case. If this area of the law, confused because "undergoing development," maj. op. at 13 n.7, is to be clarified, it will not be through the abstract application of general principles, but through a detailed discussion of the pertinent differences and similarities. I cannot believe that this is an inappropriate function for "an intermediate appellate court." *Id.*

[42] Maj. op. at 12. The majority offers two additional reasons for distinguishing *Data Processing*. The first is that the case did "not clearly define the contours of competitor standing as conceived by the Supreme Court." The majority states, for example, that it is unclear whether "a successful claim of competitor standing necessitates naming one or more specific competitors as party opponents." *Id.* at 11 n.5. But surely this doubt should be laid to rest by the complaint in case No. 61 of Investment Co. Institute v. Camp, 401 U.S. 617 (1971), *see* note 37 *supra*, in which, as in the instant case,

to the extent of the injury suffered, not to its speculative or hypothetical nature. And so long as appellants have alleged any "identifiable trifle" of an injury, they should be granted standing. *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973); *Tax Analysts and Advocates* v. *Blumenthal*, No. 75-1304, slip op. at 12 (D.C. Cir. 15 June 1977). Because I believe that *Data Processing* controls this case, I would hold that appellants have alleged injury in fact sufficient to meet the prerequisites of Article III.

## II. Zone of Interests

*Data Processing* announced two tests for standing: A petitioner must allege injury in fact, and he must allege that the "interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. The majority in *Tax Analysts*, following a different approach from that in *Travel Agents*, finds that appellant Field has suffered injury in fact, but concludes that he must fail the zone test because he is not arguably within the zone of interests protected or regulated by the provisions of IRS § 901(b),[43] the foreign tax credit.

As the majority in *Tax Analysts* candidly admits,[44] the ambiguities and analytic deficiencies of the zone test have

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only the relevant federal official was made a party opponent and no competitors were named defendants.

The majority also attempts to distinguish *Data Processing* on the grounds that it "was not a tax case." Maj. op. at 11. While I believe this rather cryptic distinction goes to the heart of the majority's holding, it cannot without further elaboration be the basis of a principled distinction. What is needed is a full discussion of the difference between challenges of the rulings of the IRS and challenges of the rulings of other administrative agencies.

[43] *See* note 11 *supra*.

[44] Maj. op. at 13.



in recent years suffered scathing criticism.[45] In order to reach its conclusion, the majority is forced to undertake an extensive reevaluation of the purposes and operation of the zone test. In my opinion not only does the majority reach an incorrect conclusion in the instant case, but its analysis only further confuses an already unfortunately unsettled area of the law.

### A. *Defining the Zone of Interests*

The majority begins with the premise that the zone test must be "based on discerned Congressional purpose." [46] It concludes that the function of the zone test is to allow "courts to define those instances when it believes the exercise of its power at the instigation of the particular party is not congruent with the mandate of the legislative branch in a particular subject area." [47]

I agree with the majority's premise. The real question, however, is how "the mandate of the legislative branch" is to be determined. In some cases congressional intent will be manifest. In *Travel Agents*, for example, the legislative history of sections 511-513 of the Code [48] clearly indicates that Congress intended to eliminate the unfair competition that results when tax-exempt organizations compete with tax-paying enterprises. Both House and Senate Committee reports state that "[t]he problem at which the tax on unrelated business income is directed is primarily unfair competition." H. R. Rep. No. 2319, 81st Cong., 2d Sess. 36 (1950); S. Rep. No. 2375, 81st

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[45] *See, e.g.*, K.C. Davis, Administrative Law Treatise (Supp. 1970) § 22.00-3; Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 664 n.88 (1973).

[46] Maj. op. at 16.

[47] *Id.* at 15.

[48] *See* notes 5 and 8 *supra*.

Cong., 2d Sess. 28 (1950).[49] There is no doubt, therefore, that appellants would have satisfied the zone test.

In other cases, however, the legislative mandate will be silent or ambiguous with respect to the interests of a "particular party." In such cases it is necessary to develop rules for the constructive interpretation of congressional purpose. Decisions of the Supreme Court that have enunciated and applied the zone test are the most authoritative source of such rules. These decisions indicate that congressional intent must be construed to include within the zone of interests to be protected or regulated by a statute those interests upon which the statute will have a readily forseeable impact.

In *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970), for example, plaintiff travel agents challenged as contrary to the Bank Service Corporation Act a ruling of the Comptroller of the Currency authorizing national banks to provide travel services for their customers. Plaintiffs themselves were clearly not the intended beneficiaries of the Act. There were unchallenged findings in the court below that the limitations on banking activity imposed by the Act "were for the purpose of insuring the stability, liquidity, and safety of the banks" and that Congress was unconcerned "with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents." 408 F.2d 1147, 1151 (1st Cir. 1969). Nevertheless the Supreme Court concluded that the interests asserted by plaintiffs were arguably within the zone of interests protected by the Act. The *only* connection between plaintiffs' interests and the Act was that "[w]hen

[49] Treasury regulations recognize that the primary purpose of the unrelated business income tax "was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the non-exempt business endeavors with which they compete . . . ." 26 C.F.R. § 1.513-1(b).



national banks begin to provide travel services for their customers, they compete with travel agents . . . ." 400 U.S. at 46.

*Investment Co. Institute* v. *Camp*, 401 U.S. 617 (1971), teaches a similar lesson. In that case plaintiff investment companies challenged a regulation of the Comptroller authorizing national banks to establish and operate collective investment funds. Plaintiffs alleged that the regulation violated provisions of the Glass-Steagall Banking Act. Despite unchallenged evidence that "neither the language of the pertinent provisions of the Glass-Steagall Act nor the legislative history evinces any congressional concern for the interests of the petitioners and others like them in freedom from competition," 401 U.S. at 640 (Harlan, J., dissenting),[50] the court held that plaintiffs satisfied the requirements of the zone test. Again, the readily forseeable impact of the statute on plaintiffs' interests was their only connection to the legislation.

These decisions, then, stand for the proposition that, in the absence of manifest congressional intent to the contrary, the zone of interests arguably protected or regulated by a statute should at a minmium include those interests upon which the statute has a readily foreseeable impact.[51] Plaintiffs asserting such interests should have standing under the zone test.

The majority, however, rejects this conclusion, arguing that "the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests." [52] The majority reasons that defining "the zone

[50] The Court even appeared to concede this point. 401 U.S. at 634. *See* Scott, *supra* note 45, at 665-66.

[51] This formulation is consistent with the only case I have found to give extensive consideration to this question, Cotovsky-Kaplan Physical Therapy Ass'n, Ltd. v. United States, 507 F.2d 1363, 1366-67 (7th Cir. 1975) (per Stevens, J.).

[52] Maj. op. at 25.

of interests as being the equivalent in every case of the 'zone of impact' or the 'zone of consequences' . . . would establish a standing doctrine based solely on the existence of harm to a party . . . ." [53] But this reasoning is clearly faulty: a statute's zone of *foreseeable* impact or consequences would not encompass every incidence of *actual* impact. And, more importantly, the majority's conclusion is flatly contradictory to the guidance of the Supreme Court.

I sense yet another, implicit reason underlying the majority's rejection of the liberal standards of *Arnold Tours* and *Investment Co. Institute*. Although the majority acknowledges that the zone test is meant to be "a quite generous standard," [54] it nevertheless argues that the test implements that aspect of standing doctrine designed to define "the proper—and properly limited—role of the courts in a democratic society." [55] This function of standing law, however, has been used to justify the *restriction* of access to federal courts.

Even if the majority has correctly identified the appropriate function of the zone test, it does not follow that the test must be interpreted in a restrictive fashion. The Supreme Court decisions that have used standing doctrine to define the role of the courts in a democracy have been in the context of constitutional challenges to government action.[56] Such challenges raise difficult issues about the

[53] *Id.* at 26.

[54] *Id.* at 16.

[55] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[56] *E.g., id.*, United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J. concurring); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 221-23 (1974); Frothingham v. Mellon, 262 U.S. 447, 488 (1923). *But see* Flast v. Cohen, 392 U.S. 82, 100 (1968): "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of power problems related to improper judicial interference in areas committed to other branches of the Federal Government."



proper judicial role because they require a non-elected judiciary on its own authority to pass on the actions of the democratic branches of government. These issues are not raised in so dramatic a fashion by the zone test, however, at least in its statutory application.[57] In that context courts are asked only to measure the authority of executive action under applicable statutes.[58] Such suits represent routine, accepted and legitimate exercises of judicial power,[59] so much so that the Supreme Court has repeatedly held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).[60] Standing doctrine and reviewability doctrine raise identical issues about the nature of the judicial role in the context of statutory review of executive action. The unproblematic nature of that role is reflected in the generosity of the *Abbott Laboratories*' standard of reviewability, and it should be reflected in an equally generous standard for standing, assuming, of course, that the injury in fact requirement

[57] And the majority chooses to discuss the zone test only in its statutory application. Maj. op. at 15. For an example of the use of the zone test in the context of a constitutional challenge to a state statute, *see* Boston Stock Exchange v. State Tax Comm'n, 97 S.Ct. 599, 602 n.3 (1977).

[58] Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

[59] *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531, at 39 (Supp. 1977).

[60] *See, e.g.*, Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Barlow v. Collins, 397 U.S. 159, 166-67 (1970). This court has noted that there is a "general rule that official administrative action is reviewable in courts when a person claims injury from an act taken by a government official in excess of his powers." Curran v. Laird, 420 F.2d 122, 128 (D.C. Cir. 1969) (en banc). *See* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 874 (D.C. Cir. 1970).

of Article III has been met. And this, I take it, is the underlying significance of the very liberal standards of *Arnold Tours* and *Investment Co. Institute.*[61]

B. *Technique in the Application of the Zone Test*

The majority devotes much of its opinion to a discussion of "the proper technique to employ in order to discern the Congressional intention in a manner which does not defeat other basic tenets of the law of standing." [62] The majority first concludes that congressional intent must be determined from the specific applicable statutory provision and not from the statute as a whole. It offers two reasons for this prescription: such a specific focus will ensure "complete adversariness," and it will reduce the possibilities of endless litigation that would "distort the role of the courts in relation to the legislative branch." [63]

I have difficulty following the majority's reasoning. If the basis of the zone test is the discernment of congressional purpose, a court should use whatever material is relevant to that inquiry. As Chief Justice Marshall advised a very long time ago, "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . . ." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). A tradi-

[61] There are very few decisions that find injury in fact but that deny standing on the basis of the zone test. K. C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-11, at 510 (1976). *See* Gifford-Hill & Co., Inc. v. FTC, 523 F.2d 730 (D.C.Cir. 1975); Clinton Community Hospital Corp. v. Southern Maryland Medical Center, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975); Higginbotham v. Barrett, 473 F.2d 745 (5th Cir. 1973); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[62] Maj. op. at 16.

[63] *Id.* at 17-18.



tional canon of statutory interpretation is that laws are to be read as a harmonious whole.[64] "It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole." *Id.* Contradictory interpretations of differing statutory sections are avoided on the assumption that statutes constitute the expression of a coherent purpose, not a patchwork of conflicting intentions.[65] Thus consideration of an entire statute is often considered necessary to an informed interpretation of any of its particular sections. And this procedure, not surprisingly, has been a standard technique among courts applying the zone test.[66]

[64] "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.' " Richards v. United States, 369 U.S. 1, 11 (1962). "Emphasis should be laid . . . upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts." United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 544 (1940). *See* Philbrook v. Glodgett, 421 U.S. 707, 713-14 (1975); Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609, 631-32 (1973); United States v. Alpers, 338 U.S. 680, 684 (1950); Markham v. Cabell, 326 U.S. 404, 411 (1945).

[65] NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); FPC v. Panhandle Eastern Pipeline Co., 337 U.S. 498, 514 (1949); Clark v. Uebersee Finanz-Korporation, 332 U.S. 480, 488 (1947).

[66] *See, e.g.*, Ellis v. Department of Housing and Urban Development, 551 F.2d 13, 16 (3d Cir. 1977); City of Hartford v. Towns of Glastonbury, West Hartford, and East Hartford, Nos. 76-6049,-6050,-6059, slip op. at 1096 (2d Cir. 23 December 1976); Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 33-34 (3d Cir. 1976); Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1086 (6th Cir. 1975); Thompson v. Washington, 497 F.2d 626, 632 (D.C. Cir. 1973); Davis v. Romney, 490 F.2d 1360, 1365 & n.3 (3d Cir. 1974); Constructores Civiles de Centroamerica v. Hannah, 459 F.2d 1183, 1188-89 (D.C. Cir. 1972); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

The majority's attempt to distinguish *Constructores Civiles*, maj. op. at 18-19, simply will not wash. The majority states that "[i]n

The majority's reasons for abandoning this traditional approach are simply not convincing. The "complete adversariness" that it seeks aside from being logically unconnected to the question of how many statutory provisions are at issue, is adequately served for the purposes of standing by the injury in fact suffered by the plaintiff. This injury ensures that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . ." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). And I am even more baffled by the majority's second reason, that focusing on a particular statutory section will create the possibility of endless litigation that "would distort the role of the courts in relation to the legislative branch." Examination of a particular provision in the context of an entire statute will increase the accuracy of judicial discernment of congressional purpose. And I cannot comprehend how accurately ascertaining congressional purpose can possibly distort the role of the courts with respect to Congress. Surely, the majority does not mean to argue that the possibility of increased litigation, by itself, would constitute such a distortion.

Perhaps as an illustration of its analysis, the majority blends into its theoretical reasoning a specific discussion

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*Constructores* it was acceptable to examine both particular and general provisions because those provisions shared an identity of purpose." Whether two provisions of a statute share a common purpose is a conclusion that can only be reached *after both provisions have been examined*. It therefore cannot function as a criterion of whether to examine both provisions in the first place. Driven by the illogic of their position, the majority ultimately concedes that in *Constructores* "it was necessary to examine the general language of the preamble to ensure that a grant of standing would not be inconsistent with the statutory purpose." But this reason, of course, would justify examining the general provisions of a statute *in every case*.



of the Internal Revenue Code. The Code, it notes, "does *not* have a single, unified purpose," and, therefore, litigants should not be permitted to borrow "the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision where that intent is not evident . . . ." [67]

As a conclusion this observation is unimpeachable, but it begs the real question. Even assuming, arguendo, that the relevant zone of interests emanates only from a particular provision of the Code rather than from the Code as a whole, the question of whether one provision of the Code is relevant to the interpretation of another can only be answered *after both provisions have been examined*. It is not a question that can be addressed in the abstract. Yet this is just what the majority opinion, drawing on theoretical analysis, purports to do. *A fortiori* the majority completely misses the thrust of appellant Field's argument that, although various sections of the Code have different goals, the *entire* Code is infused with certain general purposes.[68] These general purposes, he claims, arguably give rise to a zone of protected interests that emanates from the Code as a whole. The majority rejects this argument on the grounds of nothing more convincing than bald assertion.

The majority reaches a second major conclusion concerning proper technique in the application of the zone test: the examination of legislative history is to be avoided and the appropriate zone determined from "the face of

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[67] Maj. op. at 18.

[68] Appellant refers to the General Statement of H.R. REP. No. 1337, 83d Cong., 2d Sess. 1 (1954), that accompanied the enactment of the Internal Revenue Code of 1954: "In general, the purpose of these changes has been to remove inequities, to end harassment of the taxpayer and to reduce tax barriers to future expansion of production and employment."

the statute."[69] The majority is aware that courts regularly resort to legislative history in order to discern the intent of Congress. It shows less awareness that courts also regularly use legislative history for the same purpose in the application of the zone test.[70] The majority argues, however, that there are three special reasons why this latter practice should cease. First, the examination of legislative history will lead to a prejudgment of the merits of the case. Second, it is likely to be unilluminating; and third, it will undermine the generous nature of the zone test.

Taking these reasons in order, there is, first, no logical connection between the use of legislative history and a prejudgment of the merits of the case.[71] The majority thus seems to be making a psychological point: "A canvassing of the entire legislative background may lead to a decision on the question of standing based on an assessment of the strength or weakness of the claims being

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[69] Maj. op. at 21. It would be well to remember the counsel of Justice Reed: "When aid to construction of the meaning of words, as used in [a] statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543-44 (1940).

[70] *See, e.g.*, Safir v. Kreps, 551 F.2d 447, 451 (D.C. Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3013 (U.S. July 11, 1977) (No. 77-65); Rental Housing Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388, 390 (1st Cir. 1977); Hayes International Corp. v. McLucas, 509 F.2d 247, 256 (5th Cir.), *cert. denied*, 432 U.S. 864 (1975); Pesikoff v. Secretary of Labor, 501 F.2d 757, 760 n.2 (D.C. Cir.), *cert. denied*, 419 U.S. 1038 (1974); Secretary of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973); Higgenbotham v. Barrett, 423 F.2d 745, 749 (5th Cir. 1975); City of Inglewood v. City of Los Angeles, 451 F.2d 948, 955 (9th Cir. 1971); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[71] I agree with the majority, however, that standing and the merits are, and should remain, distinct issues.



presented."[72] The majority's assumption appears to be that federal judges will not be able to keep distinct issues of standing and of the merits when confronted with information relevant to both. I reject this assumption as completely unfounded. We trust federal judges to successfully perform such tasks all the time, as for example when ruling on the admissibility of evidence in non-jury trials. Standing and the merits require distinct inquiries, and federal judges are perfectly capable of using legislative history to answer the demands of each.

Second, legislative history may indeed be "unilluminating," but it also may be helpful, and there is no way of knowing until one looks. Legislative history can be and often is an important instrument in the determination of congressional intent.[73] The majority's proscription of legislative history in all cases simply because of its failure in some, reminds me of the gourmet who, having once tasted sour grapes, refused to eat anything.

Finally, there is simply no way to predict whether the resort to legislative history will expand or contract the the generosity of the zone test.[74] The results will vary from case to case. What is clear, however, is that if the determination of congressional intent is relevant, the use of legislative history may lead to more *accurate* applications of the test. The generosity of the test will be sufficiently protected by the legal standard that resolves in

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[72] Maj. op. at 19-20.

[73] *E.g.*, Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943); Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632, 687 (1949) (Frankfurter, J., dissenting, Appendix A).

[74] There is something deeply ironic in the majority's justifying its exorcism of legislative history on the grounds of defending the generosity of the zone test at the very same time as it deafens itself to appellant's arguments that, on the basis of legislative history, he is arguably within the zone of interests to be protected. *See* note 68 *supra*.

plaintiff's favor all "potential ambiguities in the legislative history" and in the face of the statute.[75]

C. *The Application of the Zone Test to Appellant Field*

The majority is aware of "the confusion surrounding the meaning of which interests are relevant to the zone test," and it concludes that what must "fall within the relevant zone" is "the particular interest the parties are asserting in the litigation."[76] Yet the majority denies Field standing because "the protective intent of the statutory section extends to all those U.S. companies doing business abroad and paying foreign income taxes" and "appellant Field cannot be said to fall within the regulatory field of concern."[77] *Therefore*, the majority argues, Field's interests cannot arguably have been intended to have been protected by §901(b). In other words, contrary to its own advice, the majority acts as if the zone test requires the *plaintiff himself* to be within the statutory zone.

The majority's conclusion that a plaintiff's interests must fall within the relevant zone, however, is correct. *Arnold Tours* and *Investment Co. Institute* make clear that a plaintiff will satisfy the zone test if he asserts interests upon which the applicable statute will have a readily foreseeable impact.

Using this framework of analysis, the interests Field asserts are arguably within the zone of interests to be protected by § 901(b). A primary purpose of that section, as the majority clearly establishes, is to prevent the double taxation of United States corporations operating abroad. But this purpose is itself founded on the deeper principle that, as one noted scholar of the foreign tax

[75] Maj. op. at 21.

[76] *Id.* at 20 n. 76.

[77] *Id.* at 23.



credit has put it, "taxpayers with an equal taxable capacity should bear an equal United States tax burden. . . . [T]he result of the operation of the credit is that United States corporations . . . with the same amount of income bear an equal total tax burden on income whether or not they are subject to foreign income taxation."[78] The section thus establishes an equation of rough equality between United States corporations that must pay certain foreign taxes and those that have tax liability only to the United States government. If the IRS were mistakenly to deny a valid application for a foreign tax credit, one side of this equation would be violated. Similarly, if the IRS were mistakenly to grant a foreign tax credit, the equation would be violated on the other side. This is essentially Field's position. He claims that his interests in tax parity with his competitors who import foreign oil are implicit in the structure of § 901(b) and that his interests are therefore arguably within the zone of interests to be protected by the section.

The legislative history of § 901(b) is silent about congressional concern for those in Field's circumstances. The readily foreseeable consequences of the foreign tax credit on Field's competitive situation, however, is powerful support for his claim. His position is indistinguishable from that of the plaintiff travel agents in *Arnold Tours* or that of the plaintiff investment companies in *Investment Co. Institute*. I would therefore grant standing to appellant Field.

[78] E. OWENS, THE FOREIGN TAX CREDIT 3 (1961).

## APPENDIX D

**Judgment of the United States Court of Appeals for the District of Columbia Circuit**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER TERM, 1977

No. 75-1782

[Filed Sep. 15, 1977]

AMERICAN SOCIETY OF TRAVEL AGENTS, INC., *et al.*,
*Appellants*

v.

MICHAEL BLUMENTHAL, Secretary of Treasury, *et al.*

*Appeal from the United States District Court for the District of Columbia*

Before: BAZELON, Chief Judge, MCGOWAN and ROBB, Circuit Judges

### JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the judgment of dismissal is affirmed, in accordance with the opinion of this court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: September 15, 1977

Opinion for the Court filed by Circuit Judge McGowan
Dissenting opinion filed by Chief Judge Bazelon



## APPENDIX E

**Order of the United States Court of Appeals for the District of Columbia Circuit, Denying Petitioners' Petition for Rehearing**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER TERM, 1977

No. 75-1782

[Filed Nov. 1, 1977]

AMERICAN SOCIETY OF TRAVEL AGENTS, INC., *et al.*, *Appellants*
v.
MICHAEL BLUMENTHAL, Secretary of Treasury, *et al.*

Before: BAZELON, Chief Judge, MCGOWAN and ROBB, Circuit Judges

ORDER

Upon consideration of the petition for rehearing filed by appellants American Society of Travel Agents, Inc., et al, it is

ORDERED by the Court that appellants' aforesaid petition is denied.

*Per Curiam*
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

## APPENDIX F

**Order of the United States Court of Appeals for the District of Columbia Circuit, Denying Petitioners' Suggestion for Rehearing *En Banc***

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SEPTEMBER TERM, 1977

No. 75-1782

[Filed Nov. 1, 1977]

AMERICAN SOCIETY OF TRAVEL AGENTS, INC., *et al.*,
*Appellants*

v.

MICHAEL BLUMENTHAL, Secretary of Treasury, *et al.*

Before: Bazelon, Chief Judge; Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges

### ORDER

The suggestion for rehearing *en banc* filed by appellants American Society of Travel Agents, Inc., et al, having been transmitted to the full Court and no Judge having requested a vote with respect thereto, it is

ORDERED by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

*Per Curiam*
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk



## APPENDIX G

**Majority Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Tax Analysts and Advocates* v. *Blumenthal*, No. 75-1304 (D.C. Cir. June 15, 1977), *petition for cert. filed*, 46 U.S.L.W. 3338 (U.S. Nov. 14, 1977) (No. 77-681)**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 75-1304

TAX ANALYSTS AND ADVOCATES, THOMAS F. FIELD,
*Appellants*

v.

MICHAEL BLUMENTHAL, Secretary of
Treasury of the United States, et al.

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Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 74-917)

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Argued 8 January 1976

Decided 15 June 1977

*Joseph Onek*, with whom *Eldon V. C. Greenberg* and *Richard A. Frank* were on the brief, for appellants.

*Leonard J. Henzke, Jr.*, Attorney, Tax Division Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney, and *Richard Farber*, Attorney, Tax Division Department of Justice, were on the brief, for appellees.

Before: BAZELON, *Chief Judge*, TAMM and WILKEY,* *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

Chief Judge Bazelon dissents and will file a statement of separate views at a later date.

WILKEY, *Circuit Judge*: The appellants in this case are Tax Analysts and Advocates (TAA), a non-profit corporation organized under the laws of the District of Columbia for the purpose of promoting tax reform, and Thomas F. Field, Executive Director of TAA. Appellants filed suit in the District Court [1] seeking a declaratory judgment that certain published and private rulings of the Internal Revenue Service (IRS) allowing tax credits for payments made to foreign nations in connection with oil extraction and production are contrary to the Internal Revenue Code (Code) and therefore unlawful.[2] In addition, appellants sought an injunction requiring the IRS to withdraw the rulings and to collect taxes from oil companies for all periods not barred by the statute of limitations in those cases where foreign tax credits were taken pursuant to the ruling.[3] Both appellants claim to have standing to sue as federal taxpayers; TAA makes this claim as the representative of its members, who are federal taxpayers,[4] while appellant Field relies on his status as an individual taxpayer.[5] In addition, appellant Field contends that he had standing as a competitor in his capacity as the owner of the entire working interest in a currently producing domestic oil well.[6]



On a motion by the defendants,[7] the District Court (Hart, J.) dismissed the complaint [8] on the grounds that appellants lacked standing to bring the action.[9] We agree with the District Judge and conclude that both appellants lack standing as federal taxpayers because they have suffered no judicially cognizable injury in this capacity, and thus affirm the District Court on the ra-

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* After oral argument, District Judge Justice, United States District Judge for the Eastern District of Texas, the third member of the panel, who was sitting by designation pursuant to 28 U.S.C. § 292(d), found it necessary to recuse himself. By random selection, Circuit Judge Wilkey was assigned to replace him on the panel and was assigned to write the opinion on 9 February 1977.

[1] Jurisdiction is alleged under 28 U.S.C. §§ 1340, 2201, 2202, and 5 U.S.C. §§ 702, 703. Amended Complaint, ¶ 2, Joint Appendix (J.A.) at 39. These latter statutory provisions no longer serve as a basis for jurisdiction in the federal courts. *See Califano* v. *Sanders*, 45 U.S.L.W. 4209, 4211 (28 Feb. 1977).

Prior to the filing of this suit in the District Court, appellants filed a petition with the Commissioner of the Internal Revenue Service seeking to have the Revenue Rulings at issue in this case revoked. According to appellants, no response was made to the petition. Amended Complaint, ¶¶ 23, 24, J.A. at 45.

[2] Amendment Complaint, J.A. at 45.

[3] *Id.* at 45-46.

[4] *Id.* ¶ 3, J.A. at 39.

[5] *Id.* ¶ 4(a), J.A. at 39.

[6] *Id.* ¶ 4(b), J.A. at 39-40. The oil well is located in Venango County, Pennsylvania; the oil produced at this location is not subject to price controls imposed by the federal government. *Id.*

[7] The defendants in this case are the Secretary of the Treasury and the Commisioner of the IRS. Both are sued in their official capacities. Amended Complaint, ¶¶ 5, 6, J.A. at 40.

[8] Appellants filed their original complaint on 17 June 1974. The complaint was amended on 13 August 1974 to reflect appellant Field's acquisition of the entire working interest in a domestic oil well.

[9] 390 F. Supp. 927 (D.D.C. 1975).

tionale stated in its opinion.[10] In addition, we conclude that Appellant Field, while suffering injury in a fact as a competitor dealing in oil extraction and production, does not assert an interest that falls within the "zone of interests" protected by the relevant provisions of the Code and therefore does not have standing in this context. Accordingly, we affirm the order of the District Court.

## I. The Nature of Appellants' Challenge

### A. *The Challenged Agency Action*

Section 901(b) of the Code allows qualified citizens of the United States and domestic corporations to claim a tax *credit* for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country. . . ." [11] This credit

[10] As federal taxpayers, both appellants claim "a personal pecuniary interest in requiring that the IRS assess and collect taxes owed by other taxpayers to the fullest possible extent under the provisions of the Code." Amended Complaint, ¶¶ 3, 4, J.A. at 39. According to the appellants, the published and private IRS rulings at issue in the case cause injury in fact to this interest by decreasing the amount of taxes paid into the Federal Treasury by United States companies operating abroad in the area of oil extraction and production. Appellants aver that the monetary loss to the United States Treasury attributable to the treatment of the foreign income taxes on income from oil production as creditable against United States tax liability, rather than as deductible costs of business, amounted to $3 billion in 1974. Amended Complaint, ¶ 16, J.A. at 42. According to appellants, this decrease in revenue causes their federal income taxes to rise in some unstated amount.

With respect to these claims of taxpayer standing, we affirm the District Court's finding of no injury in fact and adopt the reasoning of the District Court as put forth at 390 F.Supp. 932-38. Since appellants have not satisfied this basic constitutional requirement of injury in fact, there is no need to explore the other inquiries relevant to prudential limitations on standing. *See* text and notes at notes 29 to 34, *infra*. *See also Harrington* v. *Bush*, No. 75-1862, Slip Op. at 28 n.68 (D.C. Cir. 18 February 1977).

[11] 28 U.S.C. § 901(b)(1).



can be taken only for foreign income taxes paid;[12] no credit is allowed for the payment of excise taxes, severance taxes, mineral royalties, or similar payments to foreign governments. Excise taxes, severance taxes, and royalty payments are treated, when appropriate, as ordinary business expenses and therefore result in *deductions* from gross income rather than in tax credits which can offset tax liability on a dollar-for-dollar basis.

Beginning in the 1950's, the principal oil producing nations in the Middle East, North Africa and South America promulgated a series of formal income tax statutes which imposed net income taxes on United States companies producing oil in those nations.[13] In 1955, the IRS published Revenue Ruling 55-296 which allowed a foreign tax credit for income taxes paid to Saudi Arabia.[14] In 1968 the Service promulgated Revenue Ruling 68-552 allowing a foreign tax credit for income taxes imposed by Libya.[15] In addition, the IRS has issued several private rulings allowing foreign tax credits for income taxes levied by Iran, Kuwait, and Venezuela in connection with oil production in those countries.[16]

Appellants contend that the income taxes paid by United States companies to the foreign nations listed above are not creditable taxes within the meaning of Sec-

[12] 28 U.S.C. § 903 provides that "the term 'income, war profits, and excess profits taxes' shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country. . . ." Appellants claim that the payments to foreign nations at issue in this case cannot be considered as "in lieu of" taxes within the meaning of Section 903. We accept this contention as being true for the limited purpose of ruling on the question of standing. *See* note 19, *infra*.

[13] Amended Complaint, ¶ 9, J.A. at 40.

[14] 1955-1 Cum. Bull. 386.

[15] 1968-2 Cum. Bull. 306.

[16] Amended Complaint, ¶ 10, J.A. at 41; Brief for Appellees at 5.

tion 901(b) of the Code. Rather, appellants assert that these taxes are in substance either royalties paid for the right to extract oil from land owned by the foreign nations, or excise, severance, or similar taxes which are not creditable under Section 901(b).[17] Appellant Field, as the owner of a domestic oil well, pays the owner of the land on which his well is located a regular royalty payment for the right to extract oil from the land;[18] under the Code, appellant can deduct these payments from gross income but cannot credit them against his tax liability. In effect, appellants allege that the IRS has exalted form over substance in allowing the tax credits at issue; all of the injuries which appellants put forth to support their standing flow from this decision to treat the foreign income taxes as creditable taxes, rather than as deductible expenses, for their taxpaying competitors.

Having outlined the substantive merits of appellants' claims, it remains to relate this aspect of the case to the issue of standing. Under the relevant Supreme Court directive, we "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."[19] This standard of review dictates that we assume that the IRS has improperly allowed a tax credit for the payments to foreign nations in connection with oil extraction and production. This assumption as to illegality does not in and of itself confer standing on anyone to challenge the illegality.[20] Rather, as this court has stated, "*the proper inquiry is whether the illegality does injury to an interest of the*

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[17] Amended Complaint, ¶ 12, J.A. at 41.

[18] Amended Complaint, ¶ 18, 19, J.A. at 42.

[19] *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

[20] *See United States* v. *Richardson*, 418 U.S. 166, 179 (1974); *Harrington* v. *Bush*, *supra*, note 10, Slip. op. at 11 n.31.



*complaining party*."[21] We now turn to an examination of the interests and injuries put forth by appellant Field to support his standing as a competitor in this case.[22]

B. *Competitor Standing*

As an independent domestic oil producer, appellant Field competes in the domestic market with those companies which are granted tax credits for the income taxes paid to foreign nations. As a competitor, appellant Field claims that the Internal Revenue Code grants him a protected interest in competitive fairness and equity in matters of federal taxation which has been injured by the published and private rulings made pursuant to Section 901(b). Appellant believes that this asserted interest confers on him the right to "challenge[] as inequitable and illegal the favorable treatment received by others as a result of Internal Revenue Service action."[23]

Appellant alleges two injuries in his capacity as a competitor. As the first injury appellant Field alleges that the IRS rulings "result in his obtaining lower prices for his oil production than he would receive if the international companies could only deduct and not credit

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[21] *Harrington* v. *Bush*, *supra* note 10, Slip. op. at 11 (emphasis in original).

[22] The issue of taxpayer standing has been dealt with in text and notes at notes 4 to 10, *supra*, and will not concern us during the remainder of our analysis.

[23] Brief for Appellants at 18. There are statutory provisions providing for judicial review of IRS action at the request of one whose taxes are in question. See 26 U.S.C. § 6123(a). These challenges usually take place within the context of a refund or deficiency suit.

Appellant presents a different type of case in this action by attempting to use alleged competitive injury to himself as the basis for the challenge of the IRS action; he does not put forth the question of his own tax liability or that of the international companies taking advantage of the tax credit allowed by the challenged rulings as the basis for his standing.

their oil production related payments." [24] The rulings at issue in this case enable the international companies to pay far less income tax to the United States than if these payments were merely deductible. A substantial portion of the oil produced in Saudi Arabia, Libya, Kuwait, Iran and Venezuela by United States companies is exported to the United States. The prices charged by the international companies largely determine the market price for uncontrolled crude oil received by independent producers such as appellant Field. According to appellants, the lower taxes paid by the international companies allow these companies to sell their foreign oil in the United States at lower prices than would prevail if the companies could only deduct and not credit their foreign income tax payments.[25] Thus, as a consequence, appellant Field contends that the IRS rulings result in competitive injury due to the loss of potential income in the sale of his domestically produced oil.

The second injury of a competitive nature alleged by Appellant Field concerns the impact of the challenged rulings on the value of his operating interest in his domestic oil well. According to appellant Field, the challenged IRS rulings increase the net income from foreign oil production over what it would be if the foreign payments could only be deducted from gross income for federal tax purposes.[26] Thus, as a result of the rulings, foreign oil production yields higher investment returns and investors are more willing to invest in foreign oil production than they would be if the rulings had not been promulgated.[27] The value of foreign oil well investments is therefore increased relative to similar domestic

[24] Amended Complaint, ¶ 18, J.A. at 44.

[25] *Id.* § 19, J.A. at 44.

[26] *Id.*

[27] *Id.*



investments, to the alleged competitive detriment of appellant Field.

The asserted competitive interest and alleged injuries presented by appellant Field will now be tested against the standards developed by the Supreme Court in the area of standing.[28]

## II. Analysis of Standing Claims

### A. *Preliminary Considerations*

The standing doctrine has two sources: the "case or controversy" requirement of Article III of the Constitution,[29] and judicially imposed rules of self-restraint known as "prudential limitations." [30] In the context of this case, we have occasion to apply both the constitutional and prudential dimensions of the standing doctrine and thus to illuminate the relationship between these two elements of the doctrine.[31] The Article III constitutional requirement is one of "injury in fact, economic or otherwise;" [32] such injury is the "irreducible constitutional minimum which must be present in every case." [33] If a court finds that there is no injury in fact, "no

[28] *See Harrington* v. *Bush, supra* note 10, Slip. op. at 28 n.68.

[29] The Supreme Court first clearly stated the constitutional nature of the injury in fact requirement in *Flast* v. *Cohen*, 392 U.S. 83 (1968) and has been consistent in this interpretation in all subsequent discussions of standing.

[30] *See Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

[31] We deny the claims as to taxpayer standing because we find no injury in fact; *see* note 10, *supra*. With respect to competitor standing, however, we recognize that injury in fact has occurred but proceed to deny standing based on a prudential limitation; *see* Part II.B.2, *infra*.

[32] *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

[33] *Harrington* v. *Bush, supra* note 10, Slip op. at 28 n.68.

other inquiry is relevant to consideration of . . . standing." [34] The vast majority of the case law on standing at all levels of the federal court system has been directed at defining this constitutionally based concept of injury in fact.

Prudential limitations, on the other hand, are not constitutional requirements; these limitations are developed and imposed by the Supreme Court in its supervisory capacity over the federal judiciary.[35] It is clear that Congress may remove these prudential limitations by statute; Congress has chosen to exercise this authority on various occasions.[36] There has been no Congressional authorization of appellants' action here; therefore, the prudential limitations developed by the Supreme Court are fully applicable in this context.[37] To date, at least three prudential limitations have been announced by the Court. The first of these limitations to be enunciated, and the one which will be the focus of our concern in

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[34] *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 227 n.16 (1974).

[35] *See, e.g., Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

[36] For a collection of statutes in which Congress has removed the prudential standing barriers, *see* C. Wright, *et al., Federal Practice and Procedure* ¶ 3531 (p. 71, 1977 Supplement). For the clearest example of the operation of this Congressional control over prudential limitations in the judicial context, *see Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

[37] We believe that the fact that the limitations of the standing doctrine beyond injury in fact are termed "prudential limitations," does not mean that the lower courts have discretion as to whether to apply these limitations or not. The Supreme Court has announced these prudential limitations in its supervisory capacity over the federal judiciary and, in the context of cases such as the one now before us, we believe there is a nondiscretionary duty to apply the limitations. This duty to apply the standard does not detract from the discretion involved in determining whether the standard has been satisfied.



Part B.2, *infra*, is the so-called "zone test:" [38] "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." [39] The two additional prudential limitations relating to causation [40] and redressability of the grievance [41] need not be faced in the context of this case. The application of the zone test to deny standing in this case bears out the notion that, as this court has stated, "a valid claim of standing rests on more than [the] assertion of [a judicially] cognizable injury." [42]

B. *Competitor Standing*

1. *Injury in Fact.* We conclude that appellant Field has suffered injury in fact in this capacity as a competitor.[43] Although appellant's economic injury is rela-

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[38] The "zone test" is not a "test" in the sense that it is capable of mechanical application to a set of facts with an easily discernable and certain result. Rather, it is, as this court has stated, one of a *"series of inquiries"* designed to determine if a particular party has standing. *Harrington* v. *Bush, supra* note 10, Slip op. at 28 (emphasis in original). As an inquiry, the standard involves a great deal of discretion in its application. *See* note 64, *infra*. It is, therefore, for purposes of convenience that we refer to it as a "test;" this label is not intended to obscure the discretion and necessary ambiguity inherent in the inquiry.

[39] *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970).

[40] *See Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1973). *See also Harrington* v. *Bush, supra* note 10, Slip op. at 28 n.68.

[41] *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 28 (1976); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 222 (1974). *See also Harrington* v. *Bush, supra* note 10, Slip op. at 28 n. 68.

[42] *Harrington* v. *Bush, supra* note 10, Slip op. at 28 n.68.

[43] *See Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970).

tively small in magnitude,[44] this does not negate our finding of injury in fact.[45] Appellant Field has alleged "a distinct and palpable injury to himself" [46] which meets the requirements of Article III of the Constitution; given that the constitutional hurdle has been surmounted, we must not proceed to examine appellant's claim in light of the zone test.[47]

2. *Zone of Interests.* The zone test was announced and applied in 1970 in the companion cases of *Association of Data Processing Organizations* v. *Camp* [48] and *Barlow* v. *Collins.*[49] In addition, the test has been applied by the Court in two subsequent cases.[50] In applying the zone test in these four cases, the Court has not attempted a detailed explanation of the purpose, meaning, or scope of the standard. The deficiencies, ambiguities, and unresolved questions inherent in the zone test have been the subject of voluminous criticism.[51] There has also been confusion in the application of this prudential stand-

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[44] The oil well owned by appellant Field is quite small; *see* Brief for Appellants at 11.

[45] *See United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973) (identifiable trifle is sufficient for purposes of standing doctrine). The appellee's arguments to the contrary are frivolous; *see* Brief for Appellees at 10, 26-27.

[46] *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

[47] *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976).

[48] See note 32, *supra*. The *Data Processing* case also involved a claim of competitive injury.

[49] 397 U.S. 159 (1970).

[50] *Investemnt Co. Inst.*, v. *Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970).

[51] A complete bibliography of these criticisms is set forth in Note, Standing to Challenge Exclusionary Land Use Control Devices in Federal Courts after *Warth* v. *Seldin*, 29 Stan. L. Rev. 323 (1977). (hereinafter referred to as Note).



ard in the courts.[52] Some courts have chosen to ignore the zone test; [53] at least one circuit court has chosen forthrightly to state its opposition to the test.[54] Perhaps the most common pattern is to announce in conclusory terms that the zone standard has or has not been satisfied.[55]

The zone test admittedly presents the courts with an ambiguous and imprecise standard to apply; such ambiguity and imprecision are certainly not foreign to the courts, however, and none of the approaches to the zone test outlined above has contributed to the clarification of the concept.[56] Suggestions that the zone test is no longer a constituent element of the standing doctrine are, in our view, clearly incorrect. Indeed, all of the available evidence in Supreme Court cases suggests that the zone standard remains the law in this context.[57] We believe

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[52] *See, e.g., Pecos Ass'n* v. *Stans*, 452 F.2d 1233, 1235 (10th Cir. 1971) ("The interests are within the zone protected by the APA").

[53] *See, e.g., Florida* v. *Weinberger*, 492 F.2d 488 (5th Cir. 1974).

[54] *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972).

[55] *See* K. Davis, *Administrative Law of the Seventies* 512 (1976).

[56] *See* notes 52 to 54, *supra*. In another context, Justice Powell has recognized that the prudential limitations are "less easily defined" inquiries than those involving injury in fact. *Singleton* v. *Wueff*, 44 U.S.L.W. 5218 (29 June 1976) (Powell, J., concurring in part and dissenting in part). The ambiguous nature of the prudential inquiries is not, without more, a valid reason to ignore the zone standard.

[57] In all of the Supreme Court's standing decisions rendered since the zone test was announced in 1970 in which the zone standard has not been applied but in which it has been appropriate to make reference to this test, the Court has cited this standard with approval. *See Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); *United States* v. *SCRAP*, 412 U.S. 669, 686 n.13 (1973); *United States* v. *Richardson*, 418 U.S. 166, 176 n.9 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 224 n.14 (1974); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976).

that the zone test is fully applicable in this context; since we rest our denial of standing to appellant Field as a competitor squarely on the zone standard, we shall put forth in some detail the manner in which this decision has been reached.

a. *Purpose of Zone Test.* The zone test serves no independent purpose but, rather, constitutes one method to ensure that the basic purposes and policies of the standing doctrine itself are effectuated. Although the purpose of the standing doctrine has been the subject of considerable debate among the commentators,[58] the Supreme Court has been consistent in identifying two basic purposes of the doctrine. The first purpose, or basic policy, is to ensure the complete adversarial presentation of the issues before the court.[59] The second purpose concerns the "proper—and properly limited—role of the courts in a democratic society." [60] That is, the standing doctrine can be employed to define the proper judicial role relative to the other major governmental institutions in the society.[61] As the Court has stated, the "prudential rules of standing . . . serve to limit the role of the courts in resolving public disputes." [62]

We believe that the zone test is particularly suited to the task of furthering the second stated purpose of the standing doctrine relating to the role of the federal judiciary. The zone test, by its very language, implicates the relationship between the legislative and judicial branches as the predominant factor in its operation—

[58] *See* Note, *supra* note 51, at 335 n.72.

[59] *See Baker* v. *Carr*, 369 U.S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968).

[60] *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

[61] *See generally United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974).

[62] *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).



"the zone of interests to be protected or regulated by the *statute* . . . in question." [63] Thus, the zone test serves the purpose of allowing courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area.

By its choice of language, the Supreme Court has indicated that the zone test is a quite generous standard;[64] on the other hand, the test is obviously meant to serve as a limitation on those who can use the federal courts as a forum for grievances emanating from agency action taken pursuant to a particular statutory mandate. These competing considerations serve to frame the bounds of a court's discretion in applying the zone test. The discretion of a court to deny standing on the basis of the zone standard is not undefined; the zone test limitation is grounded in Congressional action as embodied in statute. The zone test therefore cannot be used arbitrarily to deny access to the courts; it is based on discerned Congressional purpose, a purpose which can be more clearly or differently defined as Congress wishes.

The most severe difficulties with the zone test derive from questions as to the proper technique to employ in order to discern the Congressional intention in a manner which does not defeat other basic tenets of the law of standing. In particular, these difficulties revolve around the decision as to which statutory provision to examine for evidence of regulatory or protective intent and the proper role of legislative history in making the threshold decision on standing.

b. *Proper Statutory Provision.* The IRS rulings being challenged in this case were issued pursuant to Section

[63] *See* note 39, *supra*. (emphasis added).

[64] The particular words which give the test this quality are "arguably" and "zone".

901 of the Code. The question then becomes: does the court look to this section of the statute (the Code) to determine which interests are arguably to be regulated or protected for purposes of the zone test, or should the court look to other sections of the statute for evidence of arguable regulatory or protective intent? The Supreme Court decisions dealing with the zone test do not provide a conclusive answer to this inquiry.[65] As will be seen, this decision is of particular significance in the context of this case.[66] Appellants urge us to adopt the second alternative—to examine statutory provisions other than those which form the basis for the lawsuit.[67] In this regard, appellants refer us to additional provisions in the Code which they believe contain the necessary evidence of Congressional intent sufficient to satisfy the zone test in this case.[68] We cannot agree with this approach; instead, we shall look only to Section 901 of the Code in our application of the zone test. Why we should do so readily becomes apparent.

Our decision to adopt this approach rests on two reasons—one general, the other with particular reference to the statutory scheme involved in this case. Generally, the statutory provision at issue in a given case, in this instance Section 901 of the Code, frames the substantive issue which a court will decide if the action proceeds to a determination on the merits. If the necessary arguable intent is found in the particular provision, this fact further ensures that the complaining party will have a strong connection to the controversy and that it will serve the policy of complete adversariness in the litigation which has as its focus the particular statutory provision.[69] If, on the other hand, standing is granted on the basis of intent inferred from statutory provisions which perhaps embody *different* goals and policies, this connection to the controversy may well be lessened. Therefore, as a general rule we believe that the particular statutory section should be the focus of analysis when applying the zone test.

[65] *See* cases listed at notes 48, 50, *supra*.

[66] *See* text at notes 69 to 70, *infra*.

[67] Appellants contend that we "must examine [the] general purpose" of the Code. (Brief at 20) to determine if the competitive interests "are within the zone of interests protected by the Internal Revenue Code." (Brief at 8). *See also* Brief for Appellants at 17-19.

[68] These additional provisions of the Code are sections 501, 502, 511-13, and 7805(b).



The wisdom of this decision to examine the particular statutory section is particularly apparent in the context of this case. The Internal Revenue Code is a extraordinarily complex statute which does *not* have a single, unified purpose. Rather, the Code is intended to accomplish a wide variety of economic and social goals and purposes. If litigants are allowed to transfer the Congressional purpose and intent embodied in one section of the Code into other contexts and situations regulated by different provisions of the Code, the possibilities for litigation would indeed be endless. We do not therefore believe that litigants can "borrow" the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision where that intent is not evident, in order to satisfy the zone test. A contrary decision in this context would distort the role of the courts in relation to the legislative branch, precisely what the zone test serves to prevent, in the area of revenue collection.

In support of their argument that the court should look beyond the particular statutory provision, appellants refer us to the decision of this court in *Constructores*

[69] *See* text and notes at notes 58 to 59, *supra*.

*Civiles de Centroamerica, S.A.* v. *Hannah.*[70] In that case action taken pursuant to the Foreign Assistance Act of 1961 [71] was challenged. In determining that appellants in that case satisfied the zone test, the court looked to the general statement of policy found in the statute.[72] Appellants in this case contend that the court's reliance on the broad general language of the preamble in the *Constructores* case supports their view that purposes embodied in other sections of the Code support their standing under the zone test. The court's action in *Constructores* was not, however, inconsistent with the technique we have chosen to employ in this case. In *Constructores* it was acceptable to examine both particular and general provisions because these provisions shared an identity of purpose. Indeed, in this context, it was necessary to examine the general language of the preamble to ensure that a grant of standing would not be inconsistent with the statutory purpose. No such similar situation is presented in this case and we therefore confine our inquiry to Section 901 of the Code.

c. *The Role of Legislative History.* In the process of deciding disputes which are properly before them, courts regularly examine in some depth and in great detail the legislative history of statutes involved in the disputes. In the context of applying the zone test to the issue of standing, however, such full-scale examinations of legislative history present special dangers and should therefore be avoided.[73] The dangers and deficiencies in the

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[70] 459 F.2d 1183 (D.C. Cir., 1972).

[71] 22 U.S.C. § 2251 et. seq. (1970).

[72] 459 F.2d 1183, 1188-89 (1972).

[73] *See Barlow* v. *Collins,* 397 U.S. 159, 168 (1970) (Brennan, J., concurring in the result and dissenting).



traditional approach to legislative history in this context are three in number.

First, and most significant, a full-scale examination of the legislative policy underlying a statutory provision may well lead to a prejudgment of the merits of the case. A canvassing of the entire legislative background may lead to a decision on the question of standing based on an assessment of the strength or weakness of the claims being presented.[74] Such a result or tendency would be inconsistent with a primary theme in the law of standing —that the question of standing is a matter apart and distinct from the merits of the substantive claims put forth.[75] It is totally acceptable to grant standing to a party to pursue an unsuccessful claim; a traditional examination of legislative history might well undermine this basic proposition.

Second, the question as to precisely which interests are meant to be regulated or protected by a statutory provision is not likely to have been faced in the legislative history in any convincing or dispositive manner. Rather, the express language of the statute is likely to be more accurate in this regard. Thus, as a source of evidence as to whether the particular interests of a particular

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[74] It was the fear of confusing the preliminary issue of *standing* with the *merits* which caused Justices Brennan and White in *Barlow* v. *Collins,* 397 U.S. 159, 168-170 (1970) to argue that examination of standing should stop with the constitutionally-spawned inquiry as to injury in fact and should not reach the "zone of interest" inquiry at all. By not relying on legislative history, as the Supreme Court indicated in *Arnold Tours, Inc.* v. *Camp,* 400 U.S. 45, 46 (1970) was proper, we avoid the danger of the court settling the merits in the guise of ruling on standing and thus meet the concern voiced by Justices Brennan and White.

[75] *See, e.g., Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp,* 397 U.S. 150, 153 (1970); *Warth* v. *Seldin,* 422 U.S. 490, 500 (1975).

plaintiff are within the relevant zone,[76] the legislative history is likely to be unilluminating.[77]

Third, a full-scale examination of legislative history presents the distinct possibility that the generous nature of the zone test, which results from the language of the test itself, will be undermined. Such an approach may lead to a requirement that there be affirmative evidence that the Congress intended that a plaintiff situated precisely as the plaintiff then standing before the court be regulated or protected. Any tendency to move in this direction would detract from the flexibility of the zone standard provided by the requirement that the plaintiffs' interest be only "arguably" within the zone. Thus, if Congress had in general terms legislated against competition in a statute, it is not difficult to find that particular competitive interests, which may not have been mentioned in the legislative history at all, are "arguably" within the zone of interests.[78] The "arguable" language of the zone test thus serves to resolve potential ambiguities in the legislative history and obviates the need to consult it in the same detail as is done when the merits of the dispute are being resolved.

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[76] We are aware of the confusion surrounding the meaning of which interests are relevant to the zone test. *See* K. Davis, Administrative Law Treatise § 22.00-1 (1970 Supplement). Essentially, the confusion surrounds what exactly has to fall within the relevant zone: 1) the parties themselves; 2) the interests of the parties in general; or 3) the particular interest the parties are asserting in the litigation. It seems clear to us that the particular interests are the relevant interests in the context of an application of the zone standard. Professor Davis agrees. *Id.*

[77] The success of a workable standing doctrine must be measured in some degree by the ease with which it can be applied. This more limited role for legislative history at this threshold stage in litigation promotes this additional goal.

[78] This is essentially what the Supreme Court did in *Arnold Tours* v. *Camp*, 400 U.S. 45 (1970).



Given these deficiencies in the traditional techniques of fully examining legislative history, we believe the appropriate test to be as follows: whether the complaining party has stated an interest which is arguable from the face of the statute. Although the Supreme Court has not explicitly endorsed this as the appropriate operational technique, it has come close to so doing in one case.[79] Thus, we believe that this approach is both consistent with the guidance we have been given by the Supreme Court and that it is supportive of other policies underlying the standing doctrine.[80]

C. *Application of Zone Test to Appellant Field.*

Having described what we believe to be the purpose of the zone test and the manner in which it should operate, it is now possible to formulate with precision the relevant zone test inquiry with respect to appellant Field's standing as a competitor: did Congress arguably legislate with respect to competition in Section 901 of the Code so as to protect the competitive interests of domestic oil producers?

We answer the posed query in the negative for the following reasons. The purpose of the tax credit provision of Section 901 of the Code is to prevent the double taxation of any United States companies operating abroad. This purpose is clear from the face of the statute itself, and has been consistently confirmed in the case law dealing with this particular provision in other contexts.[81]

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[79] *Id.*

[80] Having stated and justified this general approach to legislative history, it is necessary to state a *caveat*. We do not rule out *any* role for legislative history at this stage, and we would expect to be informed by the parties if the legislative history contained clear evidence of an intent either to allow the appellant's interests as a basis for standing or to deny standing to a party in this position.

[81] *See, e.g., Bunet* v. *Chicago Portrait Co.*, 285 U.S. 1, 2 (1932); *Bank of America National T.E.S. Ass'n* v. *United States*, 459 F.2d

The tax credit envisioned in Section 901 is also available to U.S. companies operating outside the sphere of oil extraction and production, with the same purpose of avoiding the double taxation of United States taxpayers, whether such companies have domestic competition or not. Given this purpose, it is obvious that the protective intent of the statutory section extends to all those U.S. companies doing business abroad and paying foreign income taxes.

In addition it cannot be said that parties in the position of appellant Field are arguably intended to be regulated by the provision granting tax credits; that is, appellant Field cannot be said to fall within the regulatory field of concern without stretching the concept of regulation to implausible limits.[82] Therefore, we conclude that the interests being asserted by Appellant Field as a competitor are not the interests arguably intended to be protected by the tax credit provision of section 901 which is the statutory basis for the challenge in this case. The congruence between the purpose of the statute (to prevent the double taxation of particular parties) and the interests asserted by appellant (competitive interest in fairness) is not sufficient to invoke the federal judicial power.[83]

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513, 519 (Ct. Cl. 1972), *cert. denied*, 409 U.S. 949 (1972); *Rhinehart* v. *United States*, 429 F.2d 1286, 1288 (10th Cir. 1970); *Associated Tel. & Tel. Co.* v. *United States*, 306 F.2d 824, 832-33 (2d Cir. 1962), *cert. denied*, 371 U.S. 950 (1962).

[82] See text and notes at notes 86 to 89, *infra*. Appellant is not directly regulated by the rulings being challenged in this case. Rather, a more appropriate description is that he operates in an industry which is regulated by the rulings but does not operate in that sphere of the industry which is the object of the regulation.

[83] *Cf.* cases cited at notes 48-50, supra; in these cases the congruence between the purpose of the statute (to legislate against competition generally) and the asserted interests (particular *types* of competition) was sufficient to satisfy the "arguable" terminology of the zone test.



We find it significant, as we noted earlier,[84] that appellants do not in their submissions to us attempt to persuade the court that appellant Field's asserted competitive interests fall within the zone of interests relevant to Section 901. Rather, appellants rely entirely on other provisions of the Code to argue that the zone sandard has been satisfied.[85] We have rejected this approach and put forth our reasons for so doing in part II.B.2(b), *supra*. This failure to address the issue of the zone standard as it relates to the statutory provision being challenged suggests that a convincing argument in this regard is lacking. Perhaps the most appropriate way in which we can emphasize the strength of our decision to deny standing on the basis of the zone standard is to sketch out the arguments which would need to be made in order to satisfy the zone standard in this context.

The argument that appellant Field's interests fall within the relevant zone of Section 901 rests on the premise that Section 901 can arguably be read not only as a decision to grant a tax credit to those who have paid foreign income taxes but also as a decision *not* to grant a tax credit to those who have made other sorts of payments, such as royalties, to foreign governments.[86] Under this "reverse zone of interest" analysis, competitors such as appellant Field could argue that they fall within the zone protected by the negative implication of the statutory provision.

We cannot accept this "reverse zone of interest analysis" which would extend standing to all those who may be able to allege injury because they were *not* regulated or

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[84] *See* note 67, *supra*.

[85] *See* note 68, *supra*.

[86] This seems to rest on the misapprehension that the statute is directed exclusively at the tax scheme and problems of the petroleum industry, which we pointed out above was not so.

protected by a particular statutory provision. Such an approach would render the zone standard meaningless. Although the text is a generous one, the terms "arguable" and "zone" are subject to definition in the context of particular factual situations such as presented in this case. To define the terms by reference to what they do not mean in these factual settings is clearly inappropriate.

There is one further argument concerning the zone of interests surrounding Section 901 which deserves mention. It can be argued that the decision to grant the international companies a tax credit has competitive *consequences* for parties such as appellant Field which bring him within the relevant zone. That is, since the challenged rulings have an *impact* on appellant Field in his capacity as an oil producer, he must therefore fall within the intended zone of Section 901. Every decision by a government agency generates consequences and various forms of impact on a wide range of valid interests held by a diverse range of parties. There is no doubt that the decisions embodied in the challenged revenue rulings have had an impact on appellant Field. But the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests; reference to these concepts does not aid greatly in determining whether a protected interest exists, but rather serve as part of the vocabulary in defining the relationship between an alleged injury and an asserted interest.

Thus, *consequences* and *forms of impact* do play an important role in the law of standing; these concepts are relevant in determining whether there has been *injury in fact*. So, we have not ignored the competitive consequences and impact of the challenged rulings on appellant Field; we have taken these into account in determining that appellant has suffered competitive injury in fact. A standing determination, such as the one involved with appellant Field as a competitor, involves



separate stages of analysis;[87] we cannot simply transfer the analytical concepts employed in one stage (injury in fact) to the other stages of analysis dealing with prudential limitations. We cannot define the zone of interests as being the equivalent in every case of the "zone of impact" or the "zone of consequences." To do so would establish a standing doctrine based solely on the existence of harm to a party; it is clear that, under current Supreme Court doctrine which we are obliged to apply, such a result is unacceptable[88] as contrary to the stated purposes of the doctrine.[89]

In summary, we cannot look to a "reverse zone of interests" or to the consequences and impact of the challenged agency action to define a zone within which appellant Field's competitive interests fall. Rather, we must make our decision as to whether the party before us is an intended beneficiary of the statutory provision on the basis of the interests we believe Congress arguably intended to regulate or protect in the legislation. We cannot conclude that Congress arguably intended to regulate or protect the competitive interests of appellant Field in Section 901. The existence of competitive ramifications flowing from the challenged agency action is not sufficient evidence to infer that Congress arguably intended to protect or regulate competitive interests. The arguments to the contrary fail for the reasons cited above. Without a clearer indication from Congress from which could be constructed a plausible argument that the competitive interests are "arguably" to be regulated or protected, we cannot as a prudential matter make the

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[87] *See Harrington* v. *Bush, supra* note 10, Slip op. at 28 n.68.

[88] *Id.*

[89] *See* notes 59 and 60, *supra*.

federal courts available as a forum for third-party challenges to IRS action such as the one presented here.[90]

CONCLUSION

We recognize that as the result of our decision in this case it is likely that the revenue rulings at issue in the case may go unchallenged in federal court due to the lack of a proper party to sue. This eventuality does not, however, operate in favor of granting standing to the parties in this case.[91] The standing doctrine should not be manipulated to guarantee that there is a party to bring any action in court that some persons may think desirable to have adjudicated. Since we cannot conclude that appellants have standing under the current framework of analysis provided by the Supreme Court, the order of the District Court in this case is

*Affirmed.*

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[90] A similar challenge to an IRS ruling was made in *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Indeed, this case was held in abeyance by order of this court to await guidance from the Supreme Court in this area. In *Simon*, however, the Court denied standing on grounds not relevant to this case.

The Court in *Simon* explicitly chose "not to reach the question of whether a third party ever may challenge IRS treatment of another . . . ." 426 U.S. at 37. The appellee in this case has urged us to adopt such a blanket prohibition (Brief for Appellees at 37-43), but we, too, decline to speak to this issue.

[91] *See* note 20, *supra*.



**APPENDIX H**

**Statutes**

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**Section 501(c)(3) of the Internal Revenue Code of 1954, as amended by Pub.L.No. 94-455, §§ 1307(d)(1)(A), 1313(a), 90 Stat. 1727, 1730 (Oct. 4, 1976):**

**§ 501. Exemption from tax on corporations, certain trusts, etc.**

* * * *

**(c) List of exempt organizations.**—The following organizations are referred to in subsection (a):

* * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

**Section 511(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 511(a) (1970):**

**§ 511. Imposition of tax on unrelated business income of charitable, etc., organizations.**

**(a) Charitable, etc., organizations taxable at corporation rates.**

**(1) Imposition of tax.**

There is hereby imposed for each taxable year on the unrelated business taxable income (as defined in section 512) of every organization described in paragraph (2) a normal tax and a surtax computed as provided in section 11. In making such computation for purposes of this section, the term "taxable income" as used in section 11 shall be read as "unrelated business taxable income".

**(2) Organizations subject to tax.**

**(A) Organizations described in sections 401(a) and 501(c).**

The taxes imposed by paragraph (1) shall apply in the case of any organization (other than a trust described in subsection (b) or an organization described in section 501(c)(1)) which is exempt, except as provided in this part or part II (relating to private foundations), from taxation under this subtitle by reason of section 501(a).

**(B) State colleges and universities.**

The taxes imposed by paragraph (1) shall apply in the case of any college or university which is an agency or instrumentality of any government or any political subdivision thereof,



or which is owned or operated by a government or any political subdivision thereof, or by any agency or instrumentality of one or more governments or political subdivisions. Such taxes shall also apply in the case of any corporation wholly owned by one or more such colleges or universities.

**Section 512(a)(1) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 512(a)(1) (1970):**

**§ 512. Unrelated business taxable income.**

**(a) Definition.**

For purposes of this title—

**(1) General rule.**

Except as otherwise provided in this subsection, the term "unrelated business taxable income" means gross income derived by any organization from any unrelated trade or business (as defined in section 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business, both computed with the modifications provided in subsection (b).

**Section 513(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 513(a) (1970):**

**§ 513. Unrelated trade or business.**

**(a) General rule.**

The term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to

the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 (or, in the case of an organization described in section 511(a)(2)(B), to the exercise or performance of any purpose or function described in section 501(c)(3)), except that such term does not include any trade or business—

(1) in which substantially all the work in carrying on such trade or business is performed for the organization without compensation; or

(2) which is carried on, in the case of an organization described in section 501(c)(3) or in the case of a college or university described in section 511(a)(2)(B), by the organization primarily for the convenience of its members, students, patients, officers, or employees, or, in the case of a local association of employees described in section 501(c)(4) organized before May 27, 1969, which is the selling by the organization of items of work-related clothes and equipment and items normally sold through vending machines, through food dispensing facilities, or by snack bars, for the convenience of its members at their usual places of employment; or

(3) which is the selling of merchandise, substantially all of which has been received by the organization as gifts or contributions.